United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,596

HAROLD S. CROSS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 17,597

JOHN L. JACKSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDEX

JOINT APPENDIX

[Filed May 28, 1962]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on May 1, 1962

The United States of America	:	Criminal No. 470-'62
v.	:	Grand Jury No. 546-62 576-62
Harold S. Cross John L. Jackson	:	Violation: 22 D.C.C. 2901 (Robbery)

The Grand Jury charges:

On or about February 23, 1962, within the District of Columbia, Harold S. Cross and John L. Jackson, by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, stole and took from the person and from the immediate actual possession of Thomas V. Cantwell, property of Thomas V. Cantwell and of Church of the Incarnation Washington, D C, of the value of about $811.35, consisting of the following: $30.00 in money, one billfold of the value of $3.00, one watch of the value of $15.00 and one purse of the value of $1.00, property of Thomas V. Cantwell; and $760.35 in money and two boxes, each box of the value of $1.00, property of Church of the Incarnation Washington D C.

SECOND COUNT:

On or about May 2, 1962, within the District of Columbia, Harold S. Cross and John L. Jackson, by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, stole and took from the person and from the immediate actual possession of Elva M. Burton, property of Elva M. Burton and of Joseph

A. Chase, of the value of about $106.00, consisting of $106.00 in money.

A TRUE BILL:
/s/
Foreman.

/s/ David C. Acheson
Attorney of the United States in and for the District of Columbia

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[Filed June 1, 1962]

PLEA OF DEFENDANT
[Harold S. Cross]

On this 1st day of June, 1962, the defendant Harold S. Cross, appearing in proper person and without counsel, being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads not guilty thereto.

The defendant is remanded to the District of Columbia Jail.

By direction of
Alexander Holtzoff
Presiding Judge
Criminal Court # Assign.

* * *

* * *

[Filed June 1, 1962]

PLEA OF DEFENDANT
[John L. Jackson]

On this 1st day of June, 1962, the defendant John L. Jackson, appearing in proper person and without counsel, being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads not guilty thereto.

The defendant is remanded to the District of Columbia Jail.

By direction of
Alexander Holtzoff
Presiding Judge
Criminal Court # Assign.

***

***

[Filed Oct. 5, 1962]

MOTION FOR SEVERANCE OF COUNTS
[John L. Jackson]

Comes now the defendant, John L. Jackson, by and through his attorney, and moves the Honorable Court for an order granting a severance of the two counts of the indictment and for election, separate trial or other relief, and as reasons therefore, states as follows:

1. That defendant stands indicted with co-defendant, Cross, on two (2) counts of Robbery in a single indictment. Count one alleges robbery on February 23, 1962 and Count Two alleges robbery on May 2, 1962. The complainants shown in each count are different.

2. That it appears from the indictment that each of the two counts charge distinct felonies, not provable by the same evidence and not resulting from the same series of acts.

3. That defendant feels that he would be embarrassed and confonded in rendering a proper defense to each of the charges in a single trial before a single jury and would be denied a fair and impartial trial by virtue of the joinder of the two counts in a single indictment.

Wherefore, defendant prays that this motion be granted.

/s/ William J. Garber
Attorney for Defendant
412 - 5th St. N.W., Wash. 1, D.C.

Points & Authorities:
Rule 14, F.R.Cr. P.

[Certificate of Service]

[Filed Oct. 8, 1962]

MOTION FOR SEVERANCE
[Harold S. Cross]

Now comes the defendant Harold S. Cross, through his attorney, and moves the Court for an order granting a severance in this cause.

It is believed that if the indictments are tried together since they are in nowise related it will work to the prejudice of the defendant Cross. The circumstances of one case are so revolting that it would be

difficult to get a fair and impartial trial. The situation is this: One of the indictments alleged a robbery or a larceny in a church rectory. As a result of the revolting circumstances one of the priests in the rectory had a heart attack and died. It necessarily follows that great sympathy would arise as a result of this. We do not believe that this indictment should be linked with the other indictments.

We ask therefore, that the indictments in this case be severed.

/s/ James J. Laughlin
National Press Building
Washington 4, D. C.
Counsel for the Defendant
Harold S. Cross

[Certificate of Service]

[Filed Oct. 16, 1962]

ORDER
[Denying Motion of Harold S. Cross]

Defendant Harold S. Cross's motion to sever count I from count II in order to have separate trials on each count came on for hearing before this Court on October 12, 1962. Upon full consideration of the arguments of counsel, it is by the Court this 16th day of October, 1962,

ORDERED That the motion to sever be, and the same is hereby denied.

/s/ Luther W. Youngdahl
Judge

[Filed Oct. 16, 1962]

ORDER
[Denying Motion of John L. Jackson]

Defendant John L. Jackson's motion to sever count I from count II in order to have separate trials on each count came on for hearing before this Court on October 12, 1962. Upon full consideration of the arguments of counsel, it is by the Court this 16th day of October, 1962,

ORDERED That the motion to sever be, and the same is hereby denied.

/s/ Luther W. Youngdahl
Judge

[Filed Jan. 16, 1963]

MOTION FOR REVIEW OF JURY VERDICT
[Harold S. Cross]

Comes now the petitioner, pro se, and respectfully moves this Court to make a determination as to which ROBBERY, count one or two, the Jury found petitioner guilty of commiting.

STATEMENT OF FACTS

Petitioner was indicted in two counts of ROBBERY. Count one (1) involved the robbery of a CHURCH. Count two (2) involved the robbery of a TOURIST HOME. On December 18, 1962, after trial by Jury, petitioner was found guilty of one of the two counts and aquitted of the other count. Co-defendant, Jackson, was also, at the same time, found guilty of one count and aquitted of the other.

QUESTION PRESENTED

Whether petitioner, Harold S. Cross, was found guilty on count one (1) or count two (2) of the Indictment.

CONTENTION

Petitioner contends that he was found guilty of count two (2). The Probation Officer, and the Washington Post allege that petitioner was found guilty of count one (1) instead of count two (2).

WHEREFORE, it is requested that the Court take necessary steps, even to summoning the Jury, to determine the true verdict.

/s/ Harold S. Cross
Petitioner, pro se

[JURAT dated January 15, 1963]
[Certificate of Service]

[Filed Jan. 23, 1963]

Following is long-hand note written on copy of foregoing Motion for Review of Jury Verdict:

> The jury verdict, signed by the foreman, states that the jury found defendant Cross guilty on Count I (which was robbery of a church), and not guilty on Count II, (which was robbery of a tourist home). Further review of the jury verdict is hereby denied. In addition, in pursuance to the Court's instructions, an appeal has been perfected for defendant Cross.
>
> /s/ L. W. Youngdahl,
> Judge.

[Filed Jan. 17, 1963]

JUDGMENT AND COMMITMENT
[Harold S. Cross]

On this 17th day of January, 1963 came the attorney for the government and the defendant appeared in person and by his attorney, James J. Laughlin, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and verdict of guilty of the offense of Robbery (D. C. Code 22-2901) as charged in count 1 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) years to twelve (12) years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other

qualified officer and that the copy serve as the commitment of the defendant.

/s/ Luther W. Youngdahl
United States District Judge

The Court recommends
psychiatric examination and
help.

* * * * * *

[Filed Jan. 17, 1963]

JUDGMENT AND COMMITMENT

[John L. Jackson]

On this 17th day of January, 1963 came the attorney for the government and the defendant appeared in person and by his attorney, William J. Garber, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and verdict of guilty of the offense of Robbery (D.C. Code 22-2901) as charged in count one (1) and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years to nine (9) years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Luther W. Youngdahl
United States District Judge

* * * * * *

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 17,596

HAROLD S. CROSS

Appellant

v.

UNITED STATES

Appellee

No. 17,597

JOHN L. JACKSON

Appellant

v.

UNITED STATES

Appellee

APPEAL FROM JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

LEONARD BRAMAN
839 - 17th Street, N. W.
Washington 6, D. C.
Counsel for Appellant Cross
(Appointed by this Court)

JAMES R. STONER
1402 G Street, N, W.
Washington 5, D. C.
Counsel for Appellant Jackson
(Appointed by this Court)

STATEMENT OF QUESTIONS PRESENTED

1. Whether the trial court committed prejudicial error in permitting the prosecution to cross-examine its own witness (turned hostile) on a prior inconsistent statement without admonishing the jury either at the time of the interrogation or at the close of trial that the statement was to be considered only for the purpose of impeachment and not as substantive evidence.

2. Assuming arguendo that unrelated offenses may be joined in a single indictment against multiple defendants, did the trial court err in ruling that defendants were compelled to testify on both of the unrelated offenses if they desired to take the stand on one.

3. Whether an indictment may properly join multiple defendants and multiple but unrelated offenses.

4. Where government witnesses testify to facts which, if believed by the jury, would make them out to be accomplices of the defendants in the commission of a crime, can the trial court properly instruct the jury that they must consider the witnesses to be accomplices, leaving open only the question of whether they were accomplices of the defendants, thereby in effect directing a partial verdict against the defendants.

5. Where defendants are charged with having robbed a church, whether, in order for the prosecution to avoid the missing witness instruction, the Court erred in admitting evidence regarding the prior illness and the death of a priest shortly after the commission of a robbery.

6. Where a defendant employs his own counsel and during the course of the trial demands that the Court discharge his counsel, may the Court summarily silence the defendant and force him to continue with his then counsel without first inquiring as to the basis of the defendant's demand or advising him of his rights.

I N D E X

TABLE OF CASES

STATUTES

RULES

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 17,596

HAROLD S. CROSS

Appellant

v.

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Appellant

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UNITED STATES

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BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

Appellants were charged in the same indictment with the commission of two robberies (J.A. 1-2). These consolidated appeals (Cross v. United States, No. 17,596 and Jackson v. United States, No. 17,597) are taken under 28 U.S.C., Section 1257 from the appellants' convictions of one of the robberies (J.A. 6-7; Tr. 606).

STATEMENT OF THE CASE

Appellants were jointly indicted and charged with the commission of two entirely separate and unrelated robberies, the first count charging robbery of a church rectory on February 23, 1962 and the other count charging robbery of a tourist home on May 2, 1962 (J.A. 1-2). Following denial of their pre-trial motions to sever the counts of the indictment, appellants went to trial before a jury (Youngdahl, J. presiding) and were acquitted of the tourist home robbery but convicted of the church robbery (J. A. 3-5; Tr. 606).

1. Evidence of the Priest's Death.

Prior to voir dire and out of the presence of the jury, the trial court was informed of the fact that Father Carney, an ailing priest who was present when the church was robbed, had died of a heart attack immediately after the robbery (Tr. 3). When the prosecutor stated that this would come out in the evidence (Tr. 4), defense counsel expressed apprehension that such evidence would inflame the jury (Tr. 5-6). But the prosecutor justified allusion to this circumstance on the ground that only by showing the death could he avoid a jury instruction on the missing witness rule (Tr. 5-6). No attempt was made to explain why the missing witness rule could not be obviated either by consent or by merely showing the priest's subsequent death without tying it into the robbery. Apparently accepting the prosecutor's argument, the trial judge ruled that, although the death "obviously . . . has no relevancy and is no proof as to the charge of

robbery," he would do nothing more than give an instruction to that effect to the jury (Tr. 6-7). In that posture of the case, Cross' counsel requested that the prospective jurors be interrogated on possible prejudice (Tr. 7). This was done by the Court (Tr. 12-17). The evidence heavily underscored the priest's death. Father Cantwell, who was also present during the robbery, testified to his having told the masked robbers "be careful. Father [Carney] is a very sick man" (Tr. 57), and he further pictured in graphic detail the manner of Father Carney's death moments after the robbers' departure (Tr. 63-64).

2. Kelton -- the Hostile Witness -- and His Prior Inconsistent Statement. [1]

Father Cantwell, though testifying to the facts of the church robbery, was unable to identify the two robbers because their faces were covered by silk stockings (Tr. 58-59, 70-71). The trial accordingly narrowed to the question whether the accused were the robbers. On the one hand the prosecution's principal reliance was upon two admitted dope addicts with criminal records, Kay Foster and Hazeltine Price, who testified that the accused were with them in a car parked outside of the church rectory, when the accused left the car and returned with several boxes identified as boxes which

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[1] This Court on July 12, 1963 denied Appellants' Motion For Summary Reversal based upon the claim that Kelton's prior statement was improperly admitted into evidence.

contained church money (Foster, Tr. 88-103, 105-109, 114-128; Price, Tr. 146-156, 158-165, 166-174, 181-194). 2/ On the other hand both defendants, under circumstances which will be explained later, took the stand, asserted the defense of alibi (Cross, Tr. 372-377, 392-394, 402-408; Jackson, Tr. 527, 532-535, 538-542, 547-551) and produced alibi witnesses to show that they were not at the church at the time of the robbery. (For Cross: Susenberg, Tr. 481-492, 493-496; for Jackson: Samuel Copeland, Tr. 423-429; Anderson, Tr. 429-435; Jerome Williams, Tr. 436-442; Thelma Williams, Tr. 443-448; Mamie Copeland, Tr. 449-455; Lewis, Tr. 458-465; Hargrove, Tr. 466-468, 474-480.)

In the face of this sharp cleavage in testimony perhaps the most decisive circumstance in the case was a wristwatch belonging to Father Cantwell which was taken from him at the time of the robbery (Tr. 61, 64). The prosecution attempted to show that Father Cantwell's watch was in the possession of the defendant Jackson who pawned it following the robbery under instructions from the defendant Cross (Government's Opening Statement, Tr. 46). To support this thesis Arthur R. Kelton was called as a witness. But Kelton

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2/ The testimony of Foster and Price was contradictory in material respects. Foster swore that the defendants discussed robbing the church before leaving the car (Tr. 89-90) while Price denied any such discussion (Tr. 160-161). Foster testified that the defendants left the car with guns (Tr. 91) but Price said that she did not see any weapons (Tr. 164). Foster testified that the boxes taken from the church were disposed of on the night of the robbery (Tr. 97-98). Price stated that the boxes were not disposed of until the afternoon of the day following the robbery (Tr. 153-155).

testified that he had purchased the watch from Kay Foster in March 1962 and that it was his watch, not Jackson's, which both he and Jackson pawned on April 9 using Kelton's identification (Tr. 255-258). Upon the prosecutor's announcement of surprise the Court permitted him to proceed on his indication that he had impeachment testimony consisting of a prior inconsistent statement given by the witness to the police (Tr. 258-259). Intensive questioning followed on the content of the prior statement, which statement showed Jackson's ownership of the watch. Of course, if the jury credited the witness' police statement it would follow that the watch was in Jackson's possession and not the witness'. The witness admitted being interviewed by the prosecutor a week before trial and further admitted that he had identified his police statement and then stated to the prosecutor that its contents were true (Tr. 260). Thereafter the following questions and answers were read from the police statement to the witness (Tr. 262-264; emphasis added):

> "Q Weren't you asked these questions:
>
> "Question: Arthur, I'm going to show you a Bulova yellow metal wristwatch. Have you seen it before?
>
> "Your answer is: Yes.
>
> "Question: Where?
>
> "Your answer: That's the one that was pawned.
>
> "Question: Who pawned it?
>
> "Answer: John L. Jackson.
>
> "Question: Did you see it before he pawned it?

"Your answer: No, I haven't.

"Then the question: When was the first time you saw it?

"Your answer: The day on 7th Street.

"Question: Where did he have it?

"Your answer: On his wrist."

And the prosecutor then asked "Do you remember telling the police that?" The witness replied "Yes, I do" (Tr. 264).

At no time -- either during the testimony or in the Court's final charge -- was the jury instructed that Kelton's statement could be used only to affect his credibility and not as substantive evidence of its contents.

3. The Trial Court's Ruling on Appellants' Rights to Testify.

After the prosecution rested and out of the presence of the jury, the trial court directly interrogated appellants on their desire voluntarily to take the stand (Tr. 360-362). Upon Cross' evincing a desire to testify to only one of the offenses, the Court instructed appellants that, if they chose to take the stand at all, they were subject to cross-examination on both offenses (Tr. 362-363). The full circumstances respecting this issue will be set forth in the appropriate argument section of this Brief (See Argument, Section II, infra).

4. Cross' Demand to Dispense with Counsel.

On the last day of trial, with but two witnesses remaining to testify, appellant Cross interrupted the proceedings by demanding that his employed counsel be discharged

from the case. Without pausing to inquire of the basis for the demand, the trial court summarily silenced Cross and continued with the proceedings. (Tr. 520-521.) The full substance of this development, including the manner in which Cross was prejudiced by the summary action below, will be discussed in the appropriate section of this Brief (See Argument, Section VI, infra).

5. The Trial Court's Instruction On Accomplices.

Instead of permitting the jury under proper instructions to determine whether Foster and Price were in fact accomplices of the defendants in the commission of the church robbery, the trial court charged the jury that Foster and Price "must be considered as accomplices in the alleged robbery" (Tr. 595), thus leaving to the jury only the question of whether they were accomplices of the defendants.

STATUTE AND RULE INVOLVED

Section 14-104, D. C. Code:

"Impeachment of own witness - Surprise.

"Whenever the court shall be satisfied that the party producing a witness has been taken by surprise by the testimony of such witness, such party may, in the discretion of the court, be allowed to prove, for the purpose only of affecting the credibility of the witness, that the witness has made to such party or to his attorney statements substantially variant from his sworn testimony about material facts in the cause; but before such proof can be given the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he made such statements and if so allowed to explain them."

Rule 8(b), F. R. Crim. P:

> "Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

STATEMENT OF POINTS

1. It was prejudicial error to admit Kelton's prior inconsistent statement without explicitly limiting its use to impeachment and this error was compounded when both the trial court and prosecution treated the statement as substantive evidence.

2. By compelling appellants to testify against themselves on both of the unrelated offenses if they desired to take the stand on only one, the trial court erroneously deprived appellants of their rights under the Fifth Amendment.

3. The charging of appellants with unrelated offenses in a single indictment constituted a misjoinder which required the granting of appellants' pre-trial motion to sever.

4. The trial court improperly directed a partial verdict against appellants by requiring that the jury find Foster and Price accomplices.

5. It was prejudicial error for the Court to have allowed testimony regarding the death of Father Carney shortly after the commission of the robbery.

6. Appellant Cross was improperly forced to proceed

with undesired counsel when the trial court, without any preliminary inquiry, summarily rejected Cross' demand to discharge his employed counsel.

SUMMARY OF ARGUMENT

1. When Kelton surprised the prosecution by testifying that the pawned watch was his and not Jackson's, the prosecutor's right to use the prior inconsistent statement in cross-examination was restricted by Section 14-104 of the D. C. Code "affecting the credibility of the witness. . . ." The decisions of this Court required that the jury be instructed during the interrogation, as well as at the close of the trial, that they could consider the inconsistent statement only as bearing on the witness' credibility and not as substantive evidence. The trial judge failed to so admonish the jury at any time. This constituted "plain error" under the decisions of this Court. That error was compounded to the prejudice of appellants since both the trial court and the prosecution affirmatively treated the statement as substantive evidence of its contents, thus indicating that the jury probably did the same. Possession of the watch after the robbery was a matter of great importance at the trial. Both Foster and Price were heavily discredited, and substantial alibi evidence was arrayed against them. The watch, if placed in appellants' possession by evidence independent of Foster and Price, constituted the only corroborative evidence tying appellants directly to the commission of the crime.

Nowhere, except in Kelton's prior inconsistent statement, was the watch thus placed in appellants' possession.

2. Appellants were compelled to give testimony against themselves. When the trial court interrogated Cross on his desire to take the stand, Cross clearly manifested a desire to limit his testimony to only one of the two robberies. Ignoring Cross' protestations that the joinder was unfair, the Court ruled that Cross would be subjected to cross-examination on both offenses if he took the stand at all. The same ruling was made applicable to appellant Jackson. Thus appellants, who were defendants in a criminal case, were placed under a greater disadvantage than an ordinary witness who may not be cross-examined on facts not relevant to direct examination. This was improper. The error also had the effect of depriving appellants of their rights under the Fifth Amendment by compelling them to give testimony against themselves on both unrelated offenses notwithstanding their right to limit their testimony to one.

3. The joinder against appellants of unrelated offenses was improper. Rule 8, F. R. Crim. P., does not sanction joinder of multiple and unrelated offenses against multiple defendants. Thus the indictment was defective at the outset and appellants' pre-trial motion to sever should have been granted. There was no discretion to rule otherwise. The misjoinder was not only prejudicial by itself but further prejudice resulted from it. Even assuming arguendo that a defendant in a case of proper joinder must testify to all

offenses; if he desires to testify at all, the joinder here was improper. Thus if the offenses had been severed for separate trial, appellants would have had the right to limit their testimony to the offense in question. The denial of severance deprived defendants of that right.

4. The Court's charge to the jury constituted a partially directed verdict. The credibility of the testimony of Foster and Price was, of course, for the jury. They testified to two basic facts: (a) That they themselves were at the scene; and (b) That appellants committed the crime. By instructing the jury that Foster and Price "must be considered as accomplices in the alleged robbery" the trial court compelled the jury to believe the first part of their testimony and left open to the jury only the question whether they were accomplices of appellants. This was not negated in the balance of the charge. Appellants were thus deprived of their constitutional right to trial by jury. It is immaterial that the evidence establishing Foster and Price to be accomplices was undisputed. The question was nevertheless one of fact for the jury and the authorities make it clear that the trial court was required to submit the issue to the jury.

5. The trial court also erred in permitting testimony that Father Carney had been seriously ill before the robbery and that he died moments thereafter. This inflammatory evidence had no probative value on the issue of defendants' innocence or guilt. The prosecution's purported

purpose in introducing this evidence -- that Father Carney's death had to be shown in order for the government to avoid the missing witness rule -- was a thin veil to inflame the passions of the jury against defendants. The missing witness rule could have been avoided by evidence which simply showed that Father Carney had died subsequent to the commission of the robbery. There was no need to tie the priest's death with the robbery itself. None of the admonitions given by the trial court to the jury effectively removed the inevitable prejudice which ensued from admission of this evidence.

6. A separate error remains to be considered as to appellant Cross. He was improperly forced to conclude the trial with counsel that he had originally employed but no longer desired. On the final day of trial Cross demanded in open court and in the presence of the jury that the Court discharge his employed counsel. The trial judge peremptorily silenced Cross without inquiring of the basis for his demand, without advising Cross of his right to proceed in proper person or without inquiring whether counsel for Jackson might, without conflict, undertake representation for both defendants. This was clear error under Brown v. United States, 105 U. S. App. D. C. 77, 264 F. 2d 333 (1959), cert. den., 360 U. S. 911 (1959). Notwithstanding the relatively brief time remaining for trial, the record shows that Cross was seriously prejudiced by the trial court's actions.

ARGUMENT

I.

It Was Prejudicial Error to Admit Kelton's Prior Inconsistent Statement Without Explicitly Limiting Its Use to Impeachment and This Error Was Compounded When Both the Trial Court and Prosecution Treated the Statement As Substantive Evidence.

The prosecution's use of Kelton's prior inconsistent statement was subject to the limitations of Section 14-104 of the D. C. Code which in terms deals with "Impeachment of own witness -- Surprise":

> "Whenever the court shall be satisfied that the party producing a witness has been taken by surprise by the testimony of such witness, such party may, in the discretion of the court, be allowed to prove, for the purpose only of affecting the credibility of the witness, that the witness has made to such party or to his attorney statements substantially variant from his sworn testimony about material facts in the cause; but before such proof can be given the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he made such statements and if so allowed to explain them." (emphasis added)

This case is squarely governed by Bartley v. United States, _____ U. S. App. D. C. _____, _____ F.2d (No. 17,592, decided May 29, 1963). Here, as in Bartley, the prior inconsistent statement was admitted into evidence through questions to, and answers from, the witness without limitation or qualification of any kind, either at the time of the questioning or in the closing instructions of the jury. The following rule laid down in Bartley is therefore applicable here (Id., slip opinion, at 5):

> "The differentiation, of course, is between this rigorously limited objection (i.e., impeachment), and the one of proving as a fact what is contained in the statement. The crucial character of this distinction has been recognized and emphasized by this Court. In Wheeler v. United States, 93 U. S. App. D. C. 159, 166, 211 F.2d 19, 26 (1953), cert. denied, 347 U. S. 1019, rehearing denied, 348 U. S. 852 (1954), we said that proper implementation of this statute included an explicit admonition to the jury by the court at the time a prior inconsistent statement is admitted, and also an instruction at the close of the trial, that the statement may be considered only as bearing on credibility. In this case neither was done. See also Robinson v. United States, 113 U. S. App. D. C. 372, 308 F.2d 327 (1962); cf. Bedell v. United States, 63 App. D. C. 31, 68 F.2d 776 (1934)."

The trial court's failure to give the "explicit admonition to the jury" both during and after the close of evidence thus constitutes clear error.

As in Bartley, the situation here requires that this error be recognized under the "plain error" rule.

> "The Government presses upon us the fact that the defense made no objection to the admission of Mrs. Marbury's prior contradictory statement, nor did it request the court then or thereafter to caution or instruct the jury as to the limited role which that statement could play in their deliberations. The point is appropriately made, but in the context of this case it cannot be decisive. Rule 52(b) of the Federal Rules of Criminal Procedure authorizes us to take account of '(P)lain errors or defects affecting substantial rights. . .although they were not brought to the attention of the court.'" (Id., slip opinion, at 5).

In a very real sense the prejudice here was greater than in Bartley for in this case we have both the trial court and the prosecution affirmatively treating the prior statement as substantive evidence. In Bartley the error was purely one

of omission, i.e., the trial court (as was also the case here) failed to instruct the jury that the statement was not to be used as substantive evidence.

A. The trial court equated the prior statement with the witness' testimony. After the prosecutor announced surprise and identified the witness' prior statement given to the police, the witness was asked whether the prosecutor had interviewed him in the cell block a week before trial at which time the statement was shown to him. Replying in the affirmative, the witness also admitted that he then told the prosecutor that the statement was true. (Tr. 260.) In the course of later ruling on an objection, the trial judge in open court purported to recapitulate the gist of the witness' testimony and stated, "The witness already indicated he signed the statement and the statement was true" (Tr. 261). But the witness never testimonially adopted the statement as being true, his testimony, instead, being that he had previously endorsed it as true. The trial court's remark erroneously confused an extrajudicial verification of the statement with a present, testimonial verification. This had the inevitable effect of equating impeachment evidence and substantive evidence. In point of fact the witness testified that, notwithstanding his cell block utterances, the statement was untrue in several respects (Tr. 263).

B. The prosecution's use of the statement as affirmative evidence. In its closing argument the prosecution

argued that the watch was in the defendant Jackson's possession on April 9 when it was pawned. Jackson signed Kelton's name to the pawn slip, it was argued, so that Kelton and not Jackson would be incriminated if the police investigated (Tr. 558). However, the prosecution had Kelton's testimony to deal with in asserting this theory and the manner in which Kelton's testimony was dealt with constituted clear prejudicial error (Tr. 558-559; emphasis added):

> "But we have Kelton in this particular case, ladies and gentlemen of the jury, who refused to take the rap or refused to take the responsibility of pawning this watch. You heard Kelton on the stand and you heard him testify. You heard the government announce that they were taken by surprise when he said from that witness stand that Kay Foster gave him the watch. He was read questions that he had given previously to the police -- at no time did he ever tell the police that -- questions that I interviewed him down at the cellblock a week prior to that time and he never told me about it. You can understand Kelton's attitude. He goes so far. He's got to go as far as the signature of this defendant because he knows that we have a handwriting man. So what does he do next best to try to help out the defendant, because ladies and gentlemen of the jury, he's incarcerated; he's in that jail, so naturally there is a certain amount of fear that he must have in order to testify against a co-inmate of the jail.
>
> "So when you start weighing that testimony of the watch, does that corroborate the Price girl? We have the watch in the possession of the defendant."

The assertion that Kelton "refused to take the rap or refused to take the responsibility of pawning this watch" was a clear argumentative reference to Kelton's extrajudicial statement wherein Kelton said that he had never seen the watch prior to the day it was pawned. It was only in this

statement that Kelton "refused to take the rap." In his trial testimony, however, he did "take the rap" by swearing that he had had the watch prior to the day of his meeting Jackson and pawning the watch. After thus laying its argumentative foundation based upon the statement, the prosecution in the above-quoted argument continued to exploit the statement. The prosecutor sought to impress the jury by the fact that he had "announce(d) that. . . (he was) taken by surprise" and, in personalized terms, he reminded the jury "that I interviewed him down at the cell-block a week prior to that time (i.e., of trial) and he never told me about it." After suggesting prison terror as the motive for Kelton's trial testimony, the prosecution concluded "We have the watch in the possession of the defendant."

Father Cantwell's watch loomed as a matter of great importance in the trial. If the watch were in Jackson's possession following the robbery it obviously had a very incriminating effect. Kelton's testimony that he and not Jackson had possession of the watch was a serious blow to the Government's case. Kelton testified that he had purchased the watch from Kay Foster, and he was materially corroborated when Kay Foster -- who admitted to selling articles stolen by her (Tr. 125-126) -- further admitted, under cross-examination, that she had sold a wristwatch following the robbery (Tr. 127-128). But the jury, thinking that it could credit Kelton's statement as affirmative evidence, may well have done so and thereby concluded that the watch was Jackson's.

The applicable standard for determining whether error is prejudicial was set forth in Leigh v. United States, 113 U. S. App. D. C. 390, 391, 308 F.2d 345, 346 (1962), where a document was improperly admitted into evidence:

> "The Government urges, further, that in any event, the error, if it was error, was harmless because of the other overwhelming evidence of defendant's guilt. Certain it is that evidence of his guilt, even without the card, was substantial and might very well have caused the jury to bring in a verdict of guilty, but we cannot say that the matter objected to did not have substantial influence on the jury in rendering its verdict. See Kotteakos v. United States (1946), 328 U. S. 750, at page 765, 66 S. Ct. 1239, at page 1248, 90 L. Ed. 1557, where the following appears:
>
> > '(I)f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand!'" (emphasis added)

It cannot be concluded, we submit, that the Kelton statement "did not have substantial influence on the jury in rendering its verdict." Without it, the substantial testimony of numerous alibi witnesses might well have generated a reasonable jury doubt in the mutually inconsistent stories given by Foster and Price who were already heavily impeached. Kelton's prior inconsistent statement -- which should not have been admissible as substantive evidence -- was the only corroborative

assertion tying the defendants to the crime itself, for it placed the watch in their possession. Its improper use by the jury, especially when led to do so by both court and prosecutor, might well have been decisive.

The prejudicial error here involved necessitates reversal as to appellant Cross, as well as Jackson. With respect to the watch Hazeltine Price testified for the Government that Cross had told Jackson to get rid of the watch (Tr. 156). Thus, the improper use of Kelton's statement coupled with Price's testimony would inevitably prejudice Cross, as well as Jackson. Moreover the entire thrust of the Government's case was to tie Jackson and Cross together. Indeed this was implicitly recognized by the trial court when, over objection, the Court admitted a registration card signed only by Jackson as evidence of both defendants having registered at a tourist home (Tr. 355).

II.

<u>By Compelling Appellants to Testify Against Themselves On Both of the Unrelated Offenses If They Desired to Take the Stand On Only One, the Trial Court Erroneously Deprived Appellants of Their Rights Under the Fifth Amendment</u>.

Appellants were charged under the instant indictment with the commission of two utterly unrelated robberies -- the robbery of the church rectory on February 23, 1962 and the robbery of the tourist home more than two months later. While

we hereinafter urge that the two counts should have been severed (See section III, infra), separate consideration must be given to a serious error which arose from the improvident joinder but independently prejudiced appellants' Fifth Amendment rights. This consisted of the trial court's ruling which compelled appellants to testify to each of the unrelated offenses if they chose to testify at all. For the purpose of this argument we assume, arguendo, the propriety of the joinder.

After the prosecution rested and in order to assure the voluntary nature of appellants' choice, the trial court informed them (out of the presence of the jury) of their right to take or decline to take the witness stand. With appellant Jackson standing by, the Court first spoke to Cross and concluded by asking Cross whether he desired to testify on his own behalf (Tr. 360-362). Cross significantly responded "Which case, Your Honor." In response to the Court's reply "In this case" Cross stated "I mean it's two cases together." (Tr. 362) Apparently sensing Cross' desire to limit his testimony to only one of the charges, the Court advised Cross as follows (Tr. 362-363; emphasis added):

> "THE COURT: Well, involving both counts in the indictment here.
>
> "THE DEFENDANT (Cross): Yes, but ---
>
> "THE COURT: There is just one case but there are two counts in the indictment. I am talking about this trial.
>
> "THE DEFENDANT (Cross): Yes.

"THE COURT: And when you take the stand, of course, you will be cross-examined by the government counsel as to both these counts in the indictment, and I am asking you now whether -- your attorney advises me that you have indicated to him that you want to take the stand, and this is your wish in this matter, and I want to be sure that this is your voluntary desire and wish to take the witness stand and testify in your own behalf?"

After Cross' counsel reiterated his advice that "if he did not take the stand there would be no denial of the testimony that has come in" (Tr. 364), the Court pressed Cross for a "direct answer" regarding his desire voluntarily to take the stand, and the following took place (Tr. 365-366):

"THE DEFENDANT (Cross): Well, Your Honor, if the DA -- I think it's a great injustice.

"THE COURT: Now I am going to ask you to answer the question directly.

"THE DEFENDANT (Cross): Yes, well I want to answer the question directly.

"THE COURT: Do you want to take the stand or do you not want to take the stand?

"THE DEFENDANT (Cross): I want to take the stand. I want to know one thing.

"THE COURT: What do you want to know?

"THE DEFENDANT (Cross): I think it's an injustice to run both charges together. The charges are independent of one another.

"THE COURT: That is another issue which you will have the right to contest in case the verdict goes against you. A motion has been previously made to separate the counts. A motion was previously made to separate the counts. I heard that motion and I denied that motion. Now if the verdict goes against you, you will have a right to take this case to the Court of Appeals to review that issue. This is not what I am talking to you about now, Mr. Cross. Now all I am discussing with you now, and the only

thing we should spend time on now is for you to answer the question: Do you wish to take the stand after having been fully advised by Mr. Laughlin and by the Court now as to the situation both ways? Do you wish to take the stand in your own behalf?

"THE DEFENDANT (Cross): Yes, I'll take the stand.

"THE COURT: All right, sir, that settles it. Thank you."

Following this the trial court inquired of Jackson as to whether he had heard the explanation given to Cross and, upon Jackson's replying in the affirmative, the Court inquired whether he desired to take the stand. Jackson agreed. (Tr. 366-367).

The trial judge plainly erred in advising appellants that, if they elected to take the stand to testify on one offense, they were subject to cross-examination on each of the separate offenses. This Court in Branch v. United States, 84 U.S. App. D. C. 165, 171 F.2d 337 (1948), made it abundantly clear that as respects the scope of cross-examination an accused who elects to take the stand in a criminal case is in no worse position than an ordinary witness. The Court there held:

> "The established rules in this connection are that if the accused testifies in his own behalf in a criminal case, he subjects himself to cross-examination to the same extend as any other witness. He cannot be compelled to testify as to facts not relevant to direct examination, but he can be required to supply the full details of matters within the scope of the direct examination but stated there only in part" (Id., 84 U. S. App. D. C., at 165-166, 171 F.2d 337-338).

The ruling made below did not comport with Branch.

In Tucker v. United States, 5 F.2d 818 (8th Cir. 1925) -- cited with approval in Raffel v. United States, 271 U.S. 494, 70 L. Ed. 1054 (1926) and Branch v. United States, supra -- one of the defendants took the stand and, on direct examination, limited his testimony to one element (i.e., fraudulent scheme) common to five separate charges of using the mail to defraud. Over objection the prosecution was permitted to cross-examine on the second element (i.e., actual use of the mails). In an opinion written by Judge Phillips, the court held as follows:

> "The questions asked the witness Dudley Tucker on cross-examination were clearly outside the scope of his direct testimony. They had reference to the second element of the offenses charged, while his direct examination was limited to a refutation of the first element. The questions on cross-examination did not in any way test the truth of the direct examination; they did not seek to explain or modify the same; they were asked for the sole purpose of proving an independent element in the government's case. In eliciting the answers to the questions propounded to Dudley Tucker with reference to the insertion of the advertisements, the government made Dudley Tucker its witness, and compelled him over seasonable and proper objection to be a witness against himself, in violation of the Fifth Amendment to the Constitution. There is no higher nor more important duty resting upon the courts than to see that the citizen is fully afforded the rights and immunities guaranteed to him by the Constitution." (Id., at 824)

The Tucker case is a fortiori authority in the case at bar. If a defendant has the right to take the stand and testify to only a part of the offense without being cross-examined as to the remainder of the very same offense, it

certainly follows that a defendant has a right to testify in extenso to one offense without being subjected to cross-examination on an entirely different offense.

Although the record leaves uncertain the offense to which Cross desired to limit his direct testimony, the error must nevertheless be considered prejudicial. It might very well be that, as was his right, he wished to avoid testimony on the church robbery and confine himself to the robbery on which he was ultimately acquitted. Indeed, this seems most probable since he had an alibi witness on whom he could rely as to the church robbery but no evidence other than his own on the tourist home robbery. With his right to silence on the church robbery erroneously taken from him, Cross was placed in a bad light as a witness. For example, he was obliged to explain his relationships with Kay Foster and Hazel Price (Tr. 378-380, 398-402, 416), which explanations no doubt prejudiced him in the eyes of the jury. 3/

3/ See, e.g., the following illustrations of prejudicial cross-examination flowing from the Court's erroneous ruling:

> "Q And when you went to bed in this tourist house with Kay Foster, how much monies did you have in your pocket?
>
> "A About twenty-two dollars, something like that.
>
> "Q And it was when you went to sleep that she stole your money? Is that right?
>
> "A That's right.
>
> "Q Well now, you are a pretty wordly-wise fellow, are you not?

3/ (cont.)

"A I don't know what you mean, wordly-wise? I don't know what you mean. Explain, please.

"Q Well what I want to know is, from what you say, from being a gambler and a pool man and all that, that you would go to bed with a prostitute and not hide your money?

"A Not hide my money; no.

"Q Yes.

"A I had no reason to hide my money?

"Q What?

"A I had no reason to hide my money.

"Q You had no reason to hide your money?

"A No. " (Tr. 399-400)

* * * *

"Q Where did you get the two hundred dollars on your person?

"A I had been gambling.

"Q What?

"A I had been gambling.

"Q How long had you been carrying that two hundred dollars?

"A Maybe for about a couple of days.

"Q A couple of days?

"A Yes, sir.

"Q You hadn't been out with any prostitutes while you had that two hundred, had you?

"A No, sir.

"Q What?

"A No, sir." (Tr. 416)

The matter should stand on no different footing as to the appellant Jackson. He should not be prejudiced because he did not evince a desire to testify to only one offense. Having heard the trial court's admonitions to his co-defendant, it would have been futile for Jackson to protest. Jackson, like Cross, had filed a motion to sever the counts of the indictment and he is thus on record in opposition to the joinder (J. A. 3). He, like Cross, was obliged to take the stand under the unwarranted penalty of unlimited cross-examination.

While no objection was formally interposed to the erroneous ruling of the trial court, none was necessary. Cross adequately made clear his desire to limit his testimony to one offense. The trial court peremptorily ruled that this could not be done. Further objection would have been useless and "a palpably vain thing." Thomas v. District of Columbia, 67 App. D. C. 179, 183, 90 F.2d 424, 428 (1937). See also Mullen v. United States, 105 U. S. App. D. C. 25, 263 F.2d 275 (1958); Miller v. United States, 38 App. D. C. 361 (1912).

Additionally the matter should be noticed in any event as "plain error" under Rule 52(b), F. R. Crim. P. The lower court affirmatively undertook to describe the consequences of the accused taking the stand. The description was manifestly incorrect and "compelled" them "to be witness(es) against" themselves "in violation of the Fifth Amendment to the

Constitution." Tucker v. United States, supra, at 824.

III.

The Charging of Appellants With Unrelated Offenses In a Single Indictment Constituted a Misjoinder Which Required the Granting of Appellants' Pre-Trial Motion to Sever.

It was error to deny appellants' pre-trial motions to sever the two counts of the indictment, for the offenses there charged were improperly joined under Rule 8, F. R. Crim. P. (J. A. 3-5). This indictment joined both offenses and defendants. Since this was not a single-defendant prosecution, Rule 8(a)'s allowance of joinder of separate "offenses. . . of the same or similar character" does not apply. "Rule 8(a). . . does not apply to cases in which two or more defendants are joined in the same indictment." United States v. Welsh, 15 F.R.D. 189, 190 (D.C. D.C 1953) (Holtzoff, J.).

The question is whether the instant joinder is sanctioned by Rule 8(b) which deals with "Joinder of Defendants." That Rule limits joinder in a multiple-defendant indictment to only two situations: (1) where the indictment charges the defendants with having "participated in the same act or transaction," and (2) where the indictment alleges that defendants "participated. . . in the same series of acts or

transactions constituting an offense or offenses." 4/

Since the first ground for joinder applies only to multiple participators in a single act or transaction, it is obvious that the instant indictment, charging two acts or transactions, does not come within its terms. Nor does the instant indictment come within the second and final ground for joinder since -- although both appellants were charged with commission of each robbery -- the completely unrelated robberies do not constitute a "series of acts or transactions."

The authorities support this view. In McElroy v. United States, 164 U. S. 76 (1896), the Supreme Court, although having before it consolidated indictments charging unrelated offenses against various defendants, laid down certain guidelines for permissible joinder. While those guidelines were evolved prior to the Federal Rules, "they are still pertinent because of the similarity of the statute (Rev. Stat. §1024 (1875)) and the Rules, as well as because of the stability of criteria for a fair trial." Dunaway v. United States,

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4/ The full text of Rule 8(b) is as follows:

"Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

92 U. S. App. D. C. 299, 301, at f.n. 5, 205 F.2d 23, 24 (1953). The Supreme Court in McElroy declared as follows (Id., at 80; emphasis added):

> "It is clear that the statute does not authorize the consolidation of indictments in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which all are tried. And even if the defendants are the same in all the indictments consolidated, we do not think the statute authorizes the joinder of distinct felonies, not provable by the same evidence and in no sense resulting from the same series of acts."

No doubt can be entertained that the indictment below involved "distinct felonies," that their proof involved entirely different evidence, and that they did not result from the same series of acts.

In United States v. Welsh, 15 F.R.D. 189, 190 (D.C. D.C., 1953), Judge Holtzoff enunciated the same joinder principles under Rule 8(b) of the Federal Rules as follows:

> "But the first sentence of Rule 8(b) limits the joinder of defendants in the same indictment only to situations where they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions constituting an offense or offenses. In other words, different unconnected offenses not arising out of the same series of transactions may not be joined in an indictment in which two or more defendants are charged. There is good reason for that restriction. This is no technical limitation. The purpose is to prevent mass trials." (emphasis added)

Since the separate robberies here involved were not joinable, the lower court was bound to grant appellants' pre-trial motions. There was no discretion to act otherwise,

and denial of the motion must be considered prejudicial. "xxx where multiple defendants are charged with offenses in no way connected, and are tried together, they are prejudiced by that very fact, and the trial judge has no discretion to deny relief'." Ward v. United States, 110 U. S. App. D. C. 136, 137, 289 F.2d 877, 878 (1961) (emphasis added.) See also Ingram v. United States, 272 F.2d 567, 570 (4th Cir. 1959). Although the Ward case involved unrelated offenses charged against some but not all of the defendants, its holding is applicable here because the vice under Rule 8(b) is charging multiple defendants with unrelated offenses regardless of whether they are all charged with each offense. If the offenses are unrelated in the sense that they do not arise from the "same series of acts or transactions," the joinder is improper regardless of whether all or some of the defendants are charged with each of the offenses.

Since the misjoinder in this case inhered in the indictment, appellants, as was the case in Ward, "are prejudiced by that very fact. . ." The charging of unrelated offenses involving complicated factual issues as to each charge provided an all too easy opportunity for the jury to compromise, trading off an acquittal on one charge in exchange for conviction on the other.

But assuming, arguendo, that prejudice at trial must nevertheless be shown, such prejudice occurred here. If, as

was required, the offenses had been severed for separate trial at the pre-trial stage, appellants would have been able to limit their testimony to the offense in question. However, the joinder of offenses, which was improper ab initio, prejudiced appellants by depriving them of that right. That deprivation exists regardless of whether, in a case of proper joinder, a defendant may be cross-examined on all offenses if he elects to take the stand. In other words, we may here assume, arguendo, that the lower court's ruling on the premissible scope of cross-examination would be correct in a case of proper joinder. Nevertheless, the instant offenses were not properly joined and, had they been severed at the outset as required, appellants would have enjoyed the right expressly taken from them by the lower court. The unfairness of the proceeding was instinctively recognized by Cross when he in effect demanded severance during his colloquy with the Court on taking the stand.

This vital circumstance renders immaterial appellants' acquittal of the tourist home robbery. It also distinguishes Dunaway v. United States, supra, where denial of severance was upheld notwithstanding the accused's desire to testify separately on one of the joined offenses. Unlike the case at bar, the joinder in Dunaway was not defective in the first instance. The only question in that case was whether the permissible joinder under Rule 8 had become so prejudicial at trial as to require severance under Rule 14.

IV.

The Trial Court Improperly Directed a Partial Verdict Against Appellants by Requiring that the Jury Find Foster and Price Accomplices.

The importance of the testimony of Kay Foster and Hazel Price cannot be exaggerated. Their testimony was the sine qua non of appellants' convictions. In order to convict, the jury had to believe as Foster and Price testified: that they were accomplices to the crime which defendants committed. Manifestly the jury were not compelled to believe any part of the mutually inconsistent testimony of these admitted addicts with criminal records. Not only should the jury have had the option of concluding that, although Foster and Price were accomplices, they were not accomplices of appellants, the jury should have had the further option of disbelieving those witnesses in toto and concluding that they fabricated both their own and appellants' presence at the scene of the robbery. However, the Court's charge to the jury foreclosed that issue. The charge assumed as a matter of law that Foster and Price were in fact accomplices and left to the jury only the issue whether they were accomplices of the defendants.

After instructing on the general nature of the case, the trial court proceeded to charge the jury as follows on the subject of accomplices (Tr. 595; emphasis added):

> "Now as to the first count in this indictment, members of the jury, the two female companions, the two females whom the Government contends were the female companions of these defendants in the commission of this robbery, the Court charges you, must be considered as accomplices in the alleged robbery."

With this the Court gave the routine charge on the scrutiny which must be given to accomplice testimony, stating, inter alia, that the jury could convict solely on the testimony of an accomplice (Tr. 595-596).

It makes no difference that the trial court's purpose was to give appellants the benefit of the scrutiny-of-accomplices rule. The fact remains that the Court assumed as a matter of law that Foster and Price were accomplices and nowhere in the remainder of the charge was this negated. That assumption necessarily constituted a judicial determination of an important fact issue which thereby resulted in a partially directed verdict against appellants. The ruling, in the form of an instruction, "necessarily involved an appraisal of" the "evidence" of Foster and Price and of their "credibility by the District Judge but the trier cannot withdraw that appraisal from the jury." Young v. United States, _____ U. S. App. D. C. _____ 309 F.2d 662, 663 (1962). The cogency of the Government's evidence that Foster and Price were accomplices is not to the point for, as the Supreme Court stated in Bollenbach v. United States, 326 U. S. 607, 614 (1946)(trial court's charge held to be erroneous), "the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a

jury according to the procedure and standards appropriate for criminal trials in the federal courts."

Notwithstanding the undisputed nature of testimony on important fact issues, appellate courts have consistently rejected convictions arising from fact assumptions made by the trial court and translated to the jury in the form of instructions. Thus in United States v. Manuszak, 234 F.2d 421 (3rd Cir. 1956), the defendant was convicted of interstate transportation of stolen goods. In the words of the court, "A reading of the complete charge indicates that it assumed that a theft had occurred and created in the jury's mind the impression that their only concern was whether appellant was implicated." Id., at 424. In reversing the conviction the court declared as follows (Id., at 424-425):

> "The presumption of innocence to which appellant was entitled demanded that all factual elements of the government's case be submitted to the jury. It is immaterial that the government's evidence as to the actual theft was uncontradicted. The acceptance of such evidence and the credibility of witnesses is for the jury, even though to the court the only possible reasonable result is the acceptance and belief of the government's evidence. A partial direction of the verdict occurs when the court determines an essential fact, and this denies the appellant trial by jury." (emphasis added)

To the same effect are United States v. Raub, 177 F.2d 312, 315-316 (7th Cir. 1949) (trial court's instruction in tax evasion case that only jury issue was wrongful intent constituted an improper direction of verdict on the issue of falsity of the return, notwithstanding undisputed evidence on

the latter issue) and Carothers v. United States, 161 F.2d 718, 722 (5th Cir. 1947)(Hutcheson, J; holding erroneous trial court's instruction in an Emergency Price Control case which assumed that maximum price established by law was less than prices indictment charged defendant with receiving and submitted to the jury only the issue whether defendant actually received prices charged in the indictment).

The error committed by the court below must be considered "plain error" within the intendment of Rule 52(b), F.R. Crim. P. since it constituted an erroneous instruction on an eseential question. Tatum v. United States, 88 U. S. App. D. C. 386, 190 F.2d 612 (1951); cf., Taylor v. United States, 95 U. S. App. D. C. 373, 222 F.2d 398 (1955). This was held in United States v. Raub, supra, where -- as in this case -- the trial court in effect directed a partial verdict on an important factual issue. The court in the Raub case stated (Id., at 316):

> "We think this error so affects the substantial rights of defendant as to warrant our noticing it in spite of his failure to call it to the attention of the trial court."

Certainly it cannot be gainsaid that the error goes to the very heart of trial by "jury according to the procedure and standards appropriate for criminal trials in the federal courts." Bollenbach v. United States, supra, at 614. In fact, the error deprived appellants of their constitutional right to trial by jury. United States v. Manuszak, supra; Carothers v. United States, supra.

V.

It Was Prejudicial Error For the Court to Have Allowed Testimony Regarding the Death of Father Carney Shortly After the Commission of the Robbery

The trial court erred in permitting testimony that Father Carney had been seriously ill before the robbery and that he died shortly thereafter. At the very inception of the trial (Tr. 3-7), counsel for the appellants raised the question of the relevancy of evidence of the death of Father Carney shortly after the robbery. At that time the prosecutor stated that it would be necessary that this evidence be introduced in order for the government to avoid the missing witness rule. The court agreed that the fact that one of the priests died subsequent to the robbery would not be relevant. The following exchange took place (Tr. 5, 6 & 7):

> "MR. GARBER (counsel for Jackson): Your Honor, I would like to make this point for the record: I don't believe that the fact that one of the priests died would be relevant in this trial.
>
> "THE COURT: It hasn't any relevancy.
>
> "MR. McLAUGHLIN: I have to show that. Otherwise, I get the missing witness rule. I have to account for him not being here.
>
> * * * *
>
> "THE COURT: Of course, obviously, the fact that the priest died has no relevancy and is no proof as to the charge of robbery.
>
> "MR. LAUGHLIN (counsel for Cross): As a matter of fact, I asked for severance on this ground.

"MR. GARBER: Your Honor, it is inescapable that such evidence would perhaps inflame the jury.

"THE COURT: All I can tell the jury is that it has no relevance. I would be glad to tell the jurors in my closing instructions that it has no relevance, I would be glad to give an instruction of that kind, because it doesn't have any relevance. The fact that the priest died is no proof of the robbery, and they should not consider that as an element."

Despite the objections of counsel for appellants, the prosecutor commented upon the priest's death in his opening statement (Tr. 45) and evidence of the subsequent death of Father Carney was allowed to be introduced at the trial and in addition, Father Cantwell was allowed to testify that at the time the robbery was being committed, he advised the robbers that Father Carney was a very sick man. (Tr. 55 & 57) The prosecutor was allowed to highlight the priest's death with the question, (Tr. 64) "Did he finally die?", and the answer of Father Cantwell to that question (Tr. 64), "Yes." The admission of this testimony served only to inflame the passions of the jury against the appellants, and did not serve any probative value which could not have been obtained by simply showing that Father Carney died subsequent to the commission of the robbery and thus was not available to testify at the time of trial.

There was no need to tie the priest's death with the robbery itself. None of the admonitions given by the trial court to the jury effectively removed the inevitable prejudice which ensued from admission of this evidence and the admission was prejudicial error.

VI.

Appellant Cross Was Improperly Forced to Proceed With Undesired Counsel When the Trial Court, Without Any Preliminary Inquiry, Summarily Rejected Cross' Demand to Discharge His Employed Counsel.

Not only is the accused entitled to counsel; the accused also has the right to dispense with counsel. 28 U.S.C., Section 1654 (1952). Thus it was stated in Adams v. United States, 317 U. S. 269, 279 (1942):

> "The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. The public conscience must be satisfied that fairness dominates the administration of justice. . . But the Constitution does not force a lawyer upon a defendant. He may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open."

The record below shows that Cross was deprived of this right.

On the last day of this five-day trial, with two witnesses to go until the evidence was completed, Cross interrupted the proceedings by demanding in the presence of the jury that the Court relieve him of his employed counsel. The immediate setting of this outburst was Cross' desire to go back on the witness stand after his initial appearance (Cross' original testimony, Tr. 371-420; Cross' additional testimony, Tr. 514-519). After the prosecution completed its brief cross-examination following Cross' second appearance as a witness, Cross announced that he had something

further to say. Following consultation with his counsel, his counsel stated "I have no further examination." After stating, "Why you don't want the people to hear?" (sic) and being interrupted by the Court, Cross blurted out something to the effect that he had been offered "a government proposition." (Tr. 519) The Court ignored Cross' remark and consequently we cannot know the full substance of Cross' intended statement. The next defense witness was called and the following then took place (Tr. 520-521):

> "BY MR. GARBER (counsel for Jackson):
>
> "Q Now, Miss Hemphill, directing your attention to a few days following the 2d of May of 1962 --
>
> "THE DEFENDANT CROSS: Your Honor, I would like to have my lawyer give me my money back. I would like to have him give my money back.
>
> "THE COURT: I suggest that you refrain from any comments. We are in the trial of a case. This is not orderly and you are not to make any further outbursts.
>
> "You may proceed, counsel.
>
> "THE DEFENDANT CROSS: I don't want this man for my lawyer. I want my money back. He took my money and everything and propositions from the government and everything.
>
> "THE COURT: Go ahead. The jury is to disregard any of these outbursts. Pay no attention to them."

The examination of the witness then continued.

We need not go so far as to urge that the trial court was obliged to stop the proceedings and bring new counsel into the case. Reversible error is shown on this record

because of the trial court's summary dismissal of Cross' demand (1) without inquiring into the basis for the demand, (2) without ascertaining whether counsel for Jackson might, without conflict, undertake the completion of the case for both defendants, thus obviating the need for any continuance (see, e.g., Wynn v. United States, 107 U. S. App. D. C. 190, 275 F.2d 648 (1960)), and (3) without advising Cross of his right to proceed in proper person.

This case is entirely different from Brown v. United States, 105 U. S. App. D. C. 77, 264 F.2d 363 (1959), cert. den. 360 U. S. 911 (1959). Firstly, the Brown case dealt with the right to change assigned counsel, not employed counsel. Secondly, the accused in that case expressly negated any desire to proceed pro se by affirmatively requesting assignment of new counsel. Here the trial court silenced Cross before he was able to state any desire other than dispensing with the services of his then counsel. Thirdly, there was not even an attempt to show prejudice in Brown. Substantial prejudice in this case will presently be shown. Lastly, and most importantly, the trial court in Brown proceeded with the trial only after the accused's reason for dispensing with his then counsel was stated for the record and considered. That reason (i.e., counsel's pessimism as to the outcome of the trial) was held to be insufficient in Brown. Here the trial court summarily interrupted before Cross could effectively state the basis of his demand.

The Brown case was heard en banc by this Court. Judge Burger's concurring opinion in Brown taken into consideration with Judge Washington's dissenting opinion (concurred in by four members of the Court) show that the following statement of Judge Burger represents the law in the District of Columbia:

> ". . . .when, for the first time, an accused makes known to the court in some way that he has a complaint about his counsel, the court must rule on the matter. If the reasons are made known to the court, the court may rule without more. If no reasons are stated, the court then has a duty to inquire into the basis for the client's objection to counsel and should withhold a ruling until reasons are made known. Limited only by the necessity to ascertain the basis of the objection and then to rule on the reasons rather than on a naked request for new counsel, the trial court must be allowed very wide discretion." Id., 105 U. S. App. D. C., at 83, 264 F.2d, at 369 (emphasis as in original).

The case at bar clearly presents the situation of a "naked request" made by Cross which was summarily stifled without any inquiry by the trial court as to the reasons prompting it. The circumstances below were virtually the same as occurred in United States v. Mitchell, 138 F.2d 831 (2nd Cir. 1943). 5/ In that case the defendant, in the course of trial, demanded that the court relieve him of his then counsel. The trial court responded, "Sit down. The Jury will disregard this demonstration." Id., 137 F.2d, at 1010. While the majority of the Court (Judge Frank dissenting) ultimately held that no prejudice had

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5/ This was the second opinion in the case, the first opinion being reported in 137 F.2d 1006.

occurred since the accused had elsewhere articulated the reason prompting his request and the record showed that reason to have later been satisfied, the Court clearly held that the trial judge committed error

> ". . . in stopping the defendant so quickly, and, indeed, in not inquiring as to whether there was any reason for the demand." Id., 138 F.2d, at 831.

The overriding of Cross' demand to be rid of his then counsel was clearly prejudicial. While the accused in Brown and Mitchell received the benefit of vigorous representation, we are constrained to state that -- with all due respect to the outstanding abilities of Cross' trial counsel -- this was not the case here. Cross' representation was unfortunately half-hearted both before his demand to be rid of employed counsel as well as in the brief period of trial remaining after his demand.

A. Cross' Representation After the Counsel Episode

The record shows the following:

1. The brief closing argument of Cross' counsel was lamentably cursory. It runs only a little more than two pages of the record (Tr. 562-564). Aside from asking the jury not to be prejudiced because of the death of the priest (while stating "it would be almost impossible to do that"), only three sentences are devoted to the church robbery. Significantly, the jury is nowhere requested to bring in a verdict of not guilty.

2. Following the charge to the jury, and at the bench, Cross' counsel stated his appreciation for the fair trial given his client, stated that this had been "the worst" case which he had tried, and asked the Judge to "consider, when the jury comes in, would you consider disposing of the case? I don't see how the probation report is going to be of any good" (sic)(Tr. 604-605). This unusual request for expedition (eschewed by the trial court) reflected the same apparent lack of interest which had already been evinced prior to the counsel episode.

B. Cross' Representation Before the Counsel Episode

1. In the course of his opening statement following the conclusion of the Government's case, Cross' counsel stated that his client's "testimony" to both robberies would be "that he was not at either scene. . . ." (see opening statement of counsel, Tr. 369-370, which takes up a half page of the record). However, Cross' defense to the second robbery was not alibi. He testified that he was innocently present at the tourist home when it was robbed (Tr. 384-391).

2. In the course of the defense case, and not withstanding that Cross had testified that he was at his mother's home at the time the church was robbed, defense counsel responded as follows to an inquiry by the Court as to whether he was claiming an alibi for that offense: "No; I can't, Your Honor. I am not really entitled to any

testimony" (sic) (Tr. 457). 6/ Fortunately, however, the Court sua sponte submitted alibi to the jury in connection with the church robbery (Tr. 554).

3. Counsel's examination of his own disinterested alibi witness reads more like an unfriendly cross-examination than a direct examination of a witness whose testimony was crucial to his client. (See Susenberg's testimony, Tr. 480, 496). Not only is it reasonably clear that there was no prior interview of the witness; the direct examination alternated between asperity (see e.g., Tr. 480-485) and apparent ridicule (see e.g., Tr. 489 where the witness, after explaining how he and Cross spent the evening hours of February 23 by drinking beer and playing records which he could not now identify, was asked whether they listened to "the Blue Danube" or "Some Enchanted Evening").

4. At a bench conference called by the Court to discuss another matter, Cross' counsel gratuitously stated "I want the record to show (that) at the noon time the mother (of Cross) said the testimony by him was false and she didn't want to testify, and that is why she is not here

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6/ Cross testified that on the night the church was robbed (February 23, 1962) he was at his mother's house until 11:30 p.m. He was not able to account for his time later that evening (Tr. 376-377). However, Father Cantwell testified that the robbery took place at "exactly eleven o'clock," since "I looked at the clock and . . . It was exactly eleven o'clock". (Tr. 72)

this afternoon" (Tr. 492-493). While we appreciate the delicate situation which confronts a defense counsel in circumstances like these, it seems clear that a more proper way of "protecting the record" should be available without risking the prejudicing of the trial court. For example, the same record could have been made before the Chief Judge or the Clerk of the Court and incorporated into the trial record following the verdict. Fortunately it does not appear from this record that the trial court was prejudiced as a result of this episode.

Respectfully submitted,

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(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief were served personally, this 29th day of August, 1963, upon the United States Attorney, United States Court House, Third and Constitution Avenues, Washington 1, D. C.

Leonard Braman
Counsel for Appellant Cross
(Appointed by this Court)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17596

HAROLD S. CROSS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 17597

JOHN L. JACKSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.
FRANK Q. NEBEKER
WILLIAM H. WILLCOX,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

(1) Is the trial judge's treatment of the impeachment of a government witness, to which there was no objection, a basis for reversal of appellants' conviction?

(2) Was appellant Cross compelled to testify against his will?

(3) Are appellants entitled to a new trial by reason of their being charged in the indictment with two robberies, of one of which they were acquitted?

(4) Does the trial judge's instruction to the jury on accomplice testimony, to which there was no objection, entitle appellants to a new trial?

(5) Did the trial judge err in permitting the jury to know that one of the robbed priests died shortly after the robbery?

(6) Did the trial court deal properly with appellant Cross's outbursts?

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No. 17596

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v.

UNITED STATES OF AMERICA, APPELLEE

No. 17597

JOHN L. JACKSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

COUNTERSTATEMENT OF THE CASE

In a two-count indictment filed May 28, 1962, appellants Cross and Jackson were charged with robbery. The first count charged appellants with robbing the Church of the Incarnation and Father Thomas V. Cantwell of $811.35, on February 23, 1962. The second count charged them with robbing Elva Burton and Joseph Chase of $106 on May 2, 1962. A jury found both appellants *guilty* on the first count and *not guilty* on the second count. Cross was sentenced to prison for 4 to 12 years, Jackson for 3 to 9 years (J.A. 6–7). This appeal followed.[1]

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[1] Appellant Cross is also before this Court in another case, No. 17,775. That case is an appeal from Cross's conviction under 22 D.C. Code § 505(b) of assaulting Metropolitan Police Officer Guy O. Weigle on the occasion of Cross's arrest on May 3, 1962, the day after the robbery of Burton and Chase alleged in count two of the indictment in the present case.

The evidence as to the count on which appellants were found guilty is as follows:

GOVERNMENT EVIDENCE

The robbery of the Church of the Incarnation

In the month of February 1962 three priests, Father Cantwell, Father Carney, and Father Meehan lived in the rectory adjoining the Church of the Incarnation in northeast Washington. The address of the rectory is 880 Eastern Avenue, NE. (Tr. 54, 55, 72, 78, 79, 81). In the late evening of February 23, Father Meehan was not at home and the rectory was occupied only by Father Cantwell and Father Carney (Tr. 55). Father Cantwell left Father Carney at about twenty minutes to 11:00 p.m. and retired to his bedroom on the second floor (Tr. 55). Father Cantwell testified: "I apparently just dozed off and I heard the door buzzer sound" (Tr. 55). This was at 11:00 p.m. Father Cantwell remembered looking at his clock when the door buzzer sounded (Tr. 72). "[S]o I started to get up because ordinarily Father Carney who was very, very sick,[2] wouldn't take a door call * * *. I was going down to take care of the call. It happened it was Father Carney who went down and took care of the call. So I rolled over. And a few minutes after I heard Father Carney say to me, 'Get up, I need some help * * *.' There was a light on in the hallway and I could see him, and I heard the voice say, 'Tom, get up, I need some help.' I thought he was sick. So I thought I'd better get up. So I said, 'I'll be right up.' With that I heard a voice say at my bedroom door, 'Get up, I want to talk to you,' and I saw this figure in the door. I could see the figure outlined and I said, 'You shouldn't be up here. But step back into the room and I'll talk to you.' He says, 'Get up the way you are.' So with that the light went on in my study, and I saw this man standing with Father Carney; he had a gun in his hand, and the man facing me at the door had a gun in his hand" (Tr. 55–56). This robber stayed by Father Cantwell. He held a gun on him, ordered him about, and collected loot (Tr. 57–63, 69). The other robber, the more slender of the two,

[2] Father Carney was in retirement because of ill health (Tr. 73).

stayed close to Father Carney (Tr. 56. 58–59. 67). Father Cantwell: "When I got out of the room [the least slender robber—Tr. 69] said, 'Get me your money.' I said, 'I'll give you all of it but be careful, Father is a very sick man.' So I went to this closet and I had several boxes in the closet, petty cash box and two other boxes that contained money" (Tr. 57). The amount of money in the boxes totaled $750, and included a great deal of change (Tr. 57–58). It was the property of the church (Tr. 58). The robber took only two of the boxes, into which he put the money from the other boxes after requiring Father Cantwell to hand the money to him (Tr. 60, 68). The robber was careful not to touch anything. When he touched Father Cantwell's desk he rubbed it with what looked like a handkerchief (Tr. 60). After getting the money from the boxes he asked where Father Cantwell's money was. Father Cantwell told him it was in his bedroom. The robber ordered Father Cantwell to get the money. Father Cantwell went to his bedroom, got his billfold which contained about $30, and handed it to the robber. The robber then saw a brown leather coin case, which he took (Tr. 61). "He said, 'Is that all?' I said, 'That is all I have.' We started out of the room. As we approached the door coming out he apparently saw my watch on the dresser. He reached out and he says, 'I'll take this too,' and he took the watch and put it in his pocket" (Tr. 61–62). He then required Father Cantwell to open a filing cabinet and a desk, from which he took a one-dollar bill and some change (Tr. 62–63). Thereafter he seized the telephone and yanked it out of the wall dragging a heavy typewriter to the floor in the process. "[T]hen the two boys walked out" (Tr. 63). "I told Father Carney, I said, 'Father, sit down. I'll take over.' He sat down. I went over to the other room across the hallway to call the police and then I called Father Meehan. I got Father Meehan on the phone. * * * As I was talking to Father Meehan telling him to get the police and not to come in, I heard a noise in the room and I said, 'Hurry back, Father; I'm afraid I'm going to have trouble with Frank.' That's Father Carney. When I went back to him he was on the floor. He was not dead; he was living. He was alive when the two boys left the house, and he was alive for a couple of minutes afterwards, because he spoke to me" (Tr. 64).

Both robbers had masked themselves with "a stocking or something made of rubber" (Tr. 59). Father Cantwell could identify neither of the robbers (Tr. 66). He could describe them only by the size and their youth (Tr. 63, 67, 69). He said: "Well remember that the man who was with me sort of kept himself in such a position that I couldn't get a real good look at him. The other one, any time I looked over toward Father Carney, I was more interested in Father Carney than I was in the individual" (Tr. 66).

The testimony of Kay Foster and Hazeltine Price that appellants committed the robbery

Both these witnesses testified that Cross and Jackson were the robbers of the church (Tr. 84–202).

Kay Foster testified that she knew Cross for about a year prior to the night of the crime and Jackson for about two months prior to that night (Tr. 85, 112). Hazeltine Price had known Cross for less than a year, and Jackson for about a month (Tr. 143). The two girls testified that Cross and Jackson, in Cross's car, picked up Foster on the afternoon preceding the night of the crime, and later picked up Price (Tr. 85–87, 112–114, 144, 145, 165). The four "rode around"—Cross and Foster in the front seat, Jackson and Price in the back—until late evening, when they arrived in the vicinity of Eastern Avenue (Tr. 88, 116, 145–147, 184–186). They parked near the church (Tr. 89, 119, 131, 146–147, 162–163, 186). Cross and Jackson left the car (Tr. 88, 147–148). Foster saw Cross and Jackson carrying guns away from the car (Tr. 91). Price saw them go to the trunk of the car, but did not see what they took out of the trunk (Tr. 147, 148). The girls remained in the car after Cross and Jackson left it, Foster in the front seat, Price in the back (Tr. 91, 187). Some fifteen minutes later, Cross and Jackson returned to the car carrying various containers and assorted small items (Tr. 92, 119, 120, 148–149, 163–168). The four drove to a tourist home in the area of 11th and Monroe Streets, N.W., where they took two rooms (Tr. 93, 149, 166–169, 172, 194). This was about midnight (Tr. 121). They all counted the money on the bed of the room taken by Cross and Foster (Tr. 121–122, 152–153, 169, 194). It was a large amount

of money. Cross took some money out of a wallet (Tr. 153). Each of the girls received $25 in change (Tr. 101–102, 152–153, 170). They left this tourist home because they were made uneasy by noise and traffic (Tr. 93, 150), and went to another tourist home in the 100 block of 12th Street in the eastern part of the city (Tr. 93–94, 151, 190). At this tourist home they took two rooms and there they spent the rest of the night, Cross with Foster and Jackson with Price (Tr. 94, 151). The next morning they read of the church robbery in the paper (Tr. 95, 96, 98, 162). They left the tourist home about noon the next day and Cross and Foster separated from Jackson and Price (Tr. 94–96, 151–152, 190–191). While the four were still together they drove to the area of Key Bridge and disposed of some of the items taken in the robbery by throwing them off Key Bridge and depositing them in sewers in the area of Key Bridge (Tr. 97–98, 154, 156). On the following Monday Price saw Cross and Jackson. Jackson was wearing a watch which Price said resembled Father Cantwell's watch. Cross warned Jackson that he should rid himself of the watch (Tr. 156).

The documentary and testimonial proof furnished by the 12th Street tourist home that appellants and Foster and Price were at the tourist home on the night of the crime

Elva Mae Burton and Joseph Chase operate a tourist home at 140 12th Street, N.E. (Tr. 222–223). They were both on duty at the tourist home in the early morning hours of February 24th, 1962, the night of the robbery of the Church of the Incarnation, which had occurred at 11:00 p.m. on February 23 (Tr. 72, 223, 247). Somewhere between 3:00 and 4:00 a.m. Mrs. Burton saw Cross, Jackson, Foster and Price in the tourist home (Tr. 224–225). She had seen both Cross and Jackson on prior occasions (Tr. 223–224, , 234). Mr. Chase registered them into the tourist home (Tr. 225–226). Mrs. Burton "heard them ask the day clerk could he use some change" (Tr. 226). They stayed overnight. Mrs. Burton had left the tourist home by the time they checked out (Tr. 225).

Mr. Chase also testified that Cross, whom he had known "perhaps a year" (Tr. 248), Jackson, Foster and Price came to

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the tourist home in the early morning of February 24 "and applied for overnight lodging" (Tr. 248–250, 294–295). He "registered them in" (Tr. 250, 297, 303–304). Cross paid $10.40 for two rooms (Tr. 296–297, 308). Chase gave Cross and Jackson two cards to be signed, as the law requires (Tr. 250, 296–297, 309). He identified two cards produced in court as the registrations of Cross and Jackson (Tr. 296–297).[3] The cards showed that the pair registered at 4:40 a.m. on the morning of February 24,[4] and that they were assigned to rooms 10 and 12 (Tr. 297–298). One of the cards was signed "Mr. and Mrs. Bell." The other was signed "Mr. and Mrs. Richard Davis" (Tr. 233, 345). The Government proved, by a handwriting expert and with known writing of Jackson, that the "Davis" card was signed by Jackson (Tr. 315–320, 327, 341–353).

The recovery and introduction into evidence of one of the church's cash boxes stolen in the robbery

Kay Foster went to Winston-Salem, North Carolina, in late April 1962 with Cross, Hazeltine Price and two other persons in Cross's car (Tr. 133–135, 138, 177–179). Foster, but not Cross or Price, was arrested there (Tr. 133–135, 180).[5] Foster gave a statement to the Washington police in Winston-Salem on May 2d, and was brought back to Washington the following day (Tr. 134–137, 139). She led the police to the area around Key Bridge where the robbers had gotten rid of some of the booty (Tr. 102–103, 325–326). She pointed out a specific sewer just off George Washington Parkway near Key Bridge from which, on May 9, a green metal cash box was recovered (Tr. 103, 220–221, 325–326). Foster testified that the box was a part of the loot which she threw down the sewer shortly after

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[3] Copies of these cards are in the record before this Court.

[4] The date on the cards was February 23. Chase explained that "Our day starts at 6:00 in the evening * * * [T]he register is checked from 6:00 [p.m.] of the 23d until * * * 6:00 p.m. of the 24th, which constitutes the day of the 23d." Thus customers who came in up to 6:00 p.m. of the 24th would be registered as arriving on the 23d (Tr. 298–299).

[5] The record in Cross's other appeal in this Court shows that Cross was arrested May 3 in Washington. Note 1, *supra*. Jackson and Price were arrested in Washington in late May and in late July, 1962, respectively (Tr. 180, 333–334).

the crime when she was in the Key Bridge area with appellants and Price (Tr. 97–98, 101–102). Price testified that the box was similar to a box thrown into a sewer by Foster (Tr. 155–156). And Father Cantwell positively identified the box as belonging to the church and as one of two taken in the robbery (Tr. 67–69). The government put the box in evidence (Tr. 359).

The recovery and introduction into evidence of Father Cantwell's watch

Among the items taken by the robbers was Father Cantwell's watch (Tr. 61). Father Cantwell described the watch to the police. The police obtained the watch's serial numbers and "scratch numbers" and "placed a stop" on the watch in the police department's pawn office (Tr. 323). On April 9, 1962, the watch was pawned at the Reliable Pawn Shop, 422 9th Street, N.W. (Tr. 202–204). The pawn shop informed the pawn office. On April 10 the pawn office notified the officers investigating the church robbery that the watch had been pawned. The police recovered the watch from the pawn shop (Tr. 207, 323–324, 328). A record made by the pawn shop at the time of the pawn showed that the watch was pawned by a person who signed himself as A. Robert Kelton (Tr. 204–207, 327, 345). He showed identification bearing that name (Tr. 205–206, 209). Kelton was found (Tr. 325). He testified at the trial that appellant Jackson pawned the watch in Kelton's presence on April 9, using Kelton's identification, and that he (Kelton) borrowed two dollars of the proceeds of the pawn from Jackson (Tr. 253–258).[6] The government proved, by the testimony of a handwriting expert and with a known sample of Jackson's writing, that Kelton's name on the pawn slip was written by Jackson (Tr. 315–320, 327, 341–353). Father Cantwell identified the watch recovered from the pawn shop as his watch and as the watch which the robbers took from the rectory (Tr. 64–65). Father Cantwell's sister also identified the watch as a watch which she had given him (Tr. 49–50). The government introduced the watch into evidence (Tr. 359).

[6] Kelton's testimony is discussed in detail in Argument I, *infra*.

DEFENSE EVIDENCE

Cross's defense

Cross testified that on February 23 he was at his grandmother's house until 9:00 p.m. when he received a call asking him to come to his mother's house to repair a car belonging to his mother's roomer (Tr. 372–373). He stayed at his mother's house until about 11:30 p.m., when he went "uptown" (Tr. 376–377, 405–406). Neither his mother, his grandmother, nor the roomer testified.[7] He had done "a lot of heavy drinking" at his mother's house, and did not remember where he went or how long he stayed after he left that house (Tr. 377, 406–408).

Cross denied robbing the church (Tr. 378–379, 381–382, 391). He admitted knowing Kay Foster and Hazeltine Price (Tr. 378, 383, 408). He said that they falsely accused him because "we had a misunderstanding before. * * * I turned a trick with them and they took all my money" (Tr. 379). This alleged incident, unreported to the police, occurred in March (Tr. 379–380). He denied going on a trip with Foster and Price to North Carolina (Tr. 391). (Foster and Price had said they were there with Cross in Cross's car in late April—Tr. 133–135, 138, 177–179). He said that the car belonged to his mother and he had loaned it to one James Morgan, so that he "wouldn't have the slightest idea" whether it was taken over by the police in Winston-Salem (Tr. 396–397, 408–409). He also testified to telling someone on May 2 that his car was "involved in something" in North Carolina (Tr. 384, 390). He testified both that he was not in Chase and Burton's tourist home in the early morning of February 24th (Tr. 407), and that he couldn't say whether or not he was there at that time (Tr. 383). He admitted signing the "Mr. and Mrs. Bell" registration card of Chase and Burton's tourist home that had been introduced into evidence by the government (Tr. 392–393, 359; and see Tr. 386–387).

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[7] Cross's counsel informed the court at the bench that Cross's mother was not called because she had told counsel that Cross "simply was not there that day," February 23d (Tr. 492–493).

Ernest Susenberg, who had known Cross all his life, testified that he and Cross repaired a car and drank at Cross's mother's house on the evening of February 23 until 11:00 p.m., when they separated (Tr. 486–489).

Cross said he had known Jackson all his life. "I don't know him personally * * * just in the neighborhood" (Tr. 393). He admitted that he "seen him in the tourist home" (Tr. 394). He admitted that on his arrest a book was found in his pocket with Jackson's name and telephone number on it (Tr. 395–396). He admitted convictions for petty larceny, grand larceny, and breaking and entering (Tr. 392).

Jackson's defense

Appellant Jackson presented seven witnesses (Tr. 423–465)—including his mother and four other members of his family (Tr. 440, 443, 451, 461)—who often get together (Tr. 426–429, 433–435, 439–440, 446–448, 452–453, 462–465), who testified that Jackson was with them at a party on the night of February 23. Jackson also took the stand, said he was at the party, and denied robbing the church (Tr. 527, 535). He said the first he had ever seen Kay Foster and Hazeltine Price was in the courtroom (Tr. 536–537). He said that he knew Cross but that he had "never been close" with him and had never been in an automobile with him (Tr. 537). He admitted signing the "Richard Davis" card from Chase and Burton's tourist home which had been put in evidence by the government (Tr. 532, 359). He said he was at the tourist home early in the morning of the 23d of February not February 24, the night of the crime (Tr. 532–533, 543). He said that when he registered he did not see Cross whom the card showed registered at exactly the same time (Tr. 539–541, 298). He said that he came to the tourist home with one Lillian Jones (Tr. 541). He testified that Lillian Jones was married and he didn't know where to locate her (Tr. 542). He also admitted to pawning Father Cantwell's watch by signing Kelton's name and using Kelton's identification (Tr. 528, 531). He said he encountered Kelton on the street on April 9, that Kelton had the watch, and that he pawned the watch for Kelton with Kelton's identification because Kelton "asked me to" (Tr. 528–532, 544–547). He admitted convictions for assault on a policeman and attempted robbery (Tr. 539).

As noted, the jury convicted appellants of robbing the church (Tr. 606).

STATUTE INVOLVED

Title 22, District of Columbia Code, Section 2901, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

SUMMARY OF ARGUMENT

1. The trial judge's failure, to which there was no objection, to instruct the jury that a prior inconsistent statement of a government witness was not evidence of its truth, was not reversible error. (a) The witness admitted making and reaffirming the prior inconsistent statement. (b) The witness's trial testimony did not exculpate appellants. (c) The part of the witness's trial testimony which was contradicted by the prior inconsistent statement was fully impeached by matter other than the prior statement. (d) The proof of appellants' guilt, apart from any questioned matter, was overwhelming.

2. The record shows that appellant Cross was not forced to testify against his will.

3. Appellants are not entitled to a new trial by reason of their being charged in the indictment with two robberies, of one of which they were acquitted.

4. There was no objection to the trial judge's instruction to the jury on the subject of accomplices. Also, the instruction did not injure but rather favored appellants.

5. The jury needed to know of Father Carney's illness and death because it was part of the proof of the robbery, it established the element of "putting in fear," it affected Father Cantwell's ability to describe the robbers, and it related to the movements of appellants the day after the crime. Also the jury needed to know why Father Carney did not testify.

6. The record shows that Judge Youngdahl correctly dealt with appellant Cross's end-of-trial contumaciousness.

ARGUMENT

I. The circumstances in which the witness Kelton gave his testimony do not entitle appellants to a new trial

Appellants assert that they are entitled to a new trial because of the circumstances in which the witness Kelton, *without objection from either appellant*, gave his testimony that Jackson pawned Father Cantwell's watch. Kelton testified that he had gotten the watch from Kay Foster (Tr. 256–257), that on April 9 he happened to encounter Jackson (Tr. 253–254), that at that time Jackson suggested pawning the watch (Tr. 272–273), and that Jackson pawned the watch using Kelton's name and identification (Tr. 257). The government announced surprise and was permitted to cross-examine (Tr. 258–259). Kelton then admitted telling the police that Jackson had the watch and that he first saw it on the day that Jackson pawned it (Tr. 263–264). He also admitted that he affirmed the statement that he gave the police about a week before he testified contrary to it (Tr. 259–260). Appellants object that Judge Youngdahl gave no instruction about the impeaching use of prior statements, but he was not requested to do so. They say it was "plain error" for him not to do so. We disagree.

(1) Quite apart from what Kelton said or once said, the evidence of appellants' guilt was overwhelming. Kay Foster and Hazeltine Price both testified that appellants were guilty of the church robbery. They knew because they were with them all during the night of the robbery. However dubious their characters, their testimony cannot be taken lightly. The fact is that it totally incriminated appellants. The stories of the two girls corroborated each other in every significant detail.[8] And their testimony was proved correct beyond peradventure of doubt by indisputable independent physical, documentary

[8] The minor differences in the girls' testimony noted by appellants (Br. 4) are not at all material. Indeed, in light of the indisputable proof that the girls knew whereof they spoke furnished by the discovery of the church's cash box where Kay Foster said it was, the differences, involving matters of detail on which memories will inevitably vary, support, rather than impeach, the veracity of the girls' testimony that appellants committed the crime.

and testimonial proof. (a) Father Cantwell said that the church robbery was committed by two young men. (b) Kay Foster led the police to a sewer where one of the cash boxes taken from the church by the robbers was hidden. (c) Foster and Price testified that after the robbery they and appellants went to Chase and Burton's tourist home. Foster, Price and the two appellants were seen together in the tourist home at 140 12th Street in the early morning after the robbery by Chase and Burton, who so testified, and who identified all four. Mrs. Burton heard them ask the day clerk if he could use some change (Father Cantwell and Foster and Price reported that a great deal of change was taken in the robbery). Beyond this, and completely devastating from appellants' point of view, the registration cards of the tourist home furnished positive documentary proof that Cross and Jackson, each accompanied by a woman, did indeed register there, *at exactly the same time*, in the early morning after the robbery. The government proved by a handwriting expert that one of the cards was signed by Jackson. *And both appellants admitted on the stand that they signed the cards.* These admissions, to say nothing of the other dubieties and inconsistencies in their testimony, made a mockery of appellants' assertions that they had had nothing to do with Foster and Price on the night of the crime,[9] and of their denials that they committed the crime. In light of this overwhelming evidence appellants' "plain error" contentions regarding Judge Youngdahl's handing of Kelton's testimony must fail.[10]

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[9] Jackson said, indeed, that he had *never* seen Foster and Price (Tr. 536–537).

[10] Appellants denigrate Foster's and Price's testimony (Br. 3–4). They say (Br. 4) that "perhaps" the most decisive circumstance in the case was Father Cantwell's wristwatch. Nowhere in their brief do appellants mention that Foster led the police to the church cash box, or (except obliquely—Br. 18) the proof that they were with Foster and Price at the tourist home on the night of the robbery, or their own admissions that they signed the registration cards. Compare *Bartley* v. *United States*, No. 17,592, decided May 29, 1963, relied on by appellants, where the accused's sole defense to a homicide was self-defense, and where *all* the testimony showed both that the decedent was the aggressor and that he had a weapon. The witness Marbury was among those who so testified. Her testimony was challenged with proof of a prior statement, unaccompanied by a limiting instruction.

(2) The record of the circumstances in which Kelton gave his testimony reveals what is at most a technical error which does not require correction by the invocation of Rule 52(b).

(a) First, it must be stressed that there is and can be no challenge to the proof that appellant Jackson pawned Father Cantwell's watch, using Kelton's identification and forging Kelton's name to do so. This was proved not only by the testimony of Kelton and the pawnbroker and by the pawn slip, *but also by the admission of Jackson himself that he pawned the watch.* Thus, it is undisputed that Jackson pawned the proceeds of the crime in surreptitious fashion, a highly incriminating act whatever explanation might have been made of it.

Appellants make much of Kelton's story to the jury that he [Kelton] had the watch and that Jackson merely pawned it for him, using Kelton's identification and forging Kelton's name. They complain of the government's attack on this tale. But, however the government attacked it, the tale is itself totally self-impeaching. A jury could have no rational basis for believing that one who was uneasy about pawning a watch would turn around and permit use of his own credentials and name to effect the pawn. Beyond that, Kelton told the jury that he borrowed two dollars from Jackson from the proceeds of the pawn, a transaction that would be meaningless had the watch been his rather than Jackson's.[11] And Jackson and Kelton told conflicting stories as to who initiated the idea of the pawn. Each accused the other (Tr. 272–273, 528–532, 544–547). Furthermore, prior to his appearance on the stand Kelton had never told anyone, including defense counsel, that he had the

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in which she said she saw no weapon. The Court said: "Absent Mrs. Marbury's prior statement the *only* evidence before the jury was to the effect that the decedent did have a weapon and, in this state of the record, the jury would have *no basis* for drawing a contrary inference." [Emphasis supplied.]

[11] QUESTION. After Jackson got the money, did you get any of the monies?

KELTON. I got about two dollars.

QUESTION. What did you get the two dollars for?

KELTON. Well, me and him was supposed to be a friend. I borrowed it (Tr. 257–258; see also Tr. 262).

Later Kelton testified that he "was going to" lend Jackson two dollars (Tr. 273).

watch before it was pawned (Tr. 289–290). Thus, Kelton's story that he had the watch prior to the day it was pawned was totally discredited, quite apart from any use or misuse of impeaching matter by the government.

(b) It is also important to note that Kelton testified that he made the prior inconsistent statement, and beyond that, that he had reaffirmed it only about a week before the trial (Tr. 259–264).[12] In *Bartley*, n. 10, *supra*, on the contrary, the witness "said that [the prior inconsistent statement] was not in the written statement when she signed it, or at least that she could not recall that it was." [13]

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[12] Kelton equivocally denied having told the police some insignificant details of the prior statement. He unequivocally testified that he told the police and later the prosecutor that he first saw the watch on the day it was pawned, and that he later reaffirmed the statement (Tr. 258–264).

[13] Furthermore, in *Bartley* "the Government produced the officer who had taken the statement and he testified that it was in the statement when it was read and signed" by the witness. In the instant case the proof that the statement was made was the witness's own admission that it was made. The statement was not introduced into evidence (Tr. 359).

The fact is that Judge Youngdahl and the prosecutor complied strictly with 14 D.C. Code § 104. That statute says:

"Whenever the court shall be satisfied that the party producing a witness has been taken by surprise by the testimony of such witness, such party may, in the discretion of the court, be allowed to prove, for the purpose only of affecting the credibility of the witness, that the witness has made to such party or to his attorney statements substantially variant from his sworn testimony about material facts in the cause; but *before* such proof can be given the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he made such statements and if so allowed to explain them." [Emphasis supplied.]

The prosecutor announced surprise and was allowed to cross-examine. He did not attempt to prove the statement before "the circumstances of the supposed statement sufficient to designate the particular occasion were mentioned to [Kelton] and he [was] asked whether or not he made such [statement] and * * * allowed to explain [it]." Kelton said that he had made the statement and gave his explanation of it, such as it was. Here the government did not have a police officer testify to the statement, as it did in *Bartley* after the witness Marbury testified. Nor did it introduce the statement into evidence (Tr. 359). Clearly the statute does not consider the procedure followed in this case to have been proof of the statement of the sort to require a limiting instruction. The statute requires such an instruction only if, *after* the witness has been asked about the statement and allowed to explain it, the government seeks to prove the statement by introducing it into evidence or by testimony other than that of the witness who

Where a witness admits that he made a prior inconsistent statement, the claim that unobjected to omission of a limiting instruction was plain error carries far less weight than when the witness denies making the statement. This is particularly so where the witness admits, as he did here, that he not only gave the statement but that he later affirmed its truth.[14]

We sum up the circumstances which make invocation of Rule 52(b) inappropriate here: (1) Kelton admitted making and reaffirming the prior inconsistent statement. (2) The part of Kelton's courtroom testimony not contradicted by the prior statement, i.e., that Jackson pawned the watch, was shown to be true by the pawn slip and Jackson's own admission, and severely incriminated Jackson, whatever explanation of it Kelton attempted. (3) Kelton's testimony that he, not Jackson, had the watch before it was pawned, which contradicted the prior statement that Jackson had the watch, was completely impeached on its face and by matter other than the prior statement. (4) The proof of appellants' guilt, apart from any questioned matter, was overwhelming.[15]

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gave it. The statute so construed is perfectly rational, particularly if the witness agrees that he made the prior inconsistent statement, as he did in the instant case. In such circumstances it cannot reasonably be said that the prior statement is any less evidence of the truth of its contents than the contradictory statement given on the stand. See McCormick, The Turncoat Witness: Previous Statements as Substantive Evidence, 25 Texas L. Rev. 543 (1947). In any event, assuming arguendo that a limiting instruction would have been required if requested, the fact that it was not given does not constitute plain error, as the rest of our argument shows.

[14] At best the distinction between impeaching and substantive use of a prior inconsistent statement is questionable, and it is a distinction that juries are not likely to grasp, or if they do grasp it, to follow. McCormick, The Turncoat Witness: Previous Statements As Substantive Evidence, n. 13, *supra* and *DiCarlo* v. *United States*, 6 F. 2d 364, 368 (2d Cir. 1925), *cert. denied*, 268 U.S. 706, cited in *Wheeler* v. *United States*, 93 U.S. App. D.C. 159, 166, 211 F. 2d 19, 26 (1953). See also Judge Hand's opinion in *United States* v. *Allied Stevedoring Corp.*, 241 F. 2d 925, 933–934 (2d Cir. 1957).

[15] Appellants note that Judge Youngdahl, after Kelton admitted that he told the prosecutor in a pretrail interview that the statement was true (Tr. 260), remarked "The witness already indicated he signed the statement and the statement was true" (Tr. 261). The episode is *de minimis*. Nor need it be assumed that the jury interpreted the remark, however imprecisely it was phrased, as other than a repetition of Kelton's clear admission that he had reaffirmed the statement prior to trial. The words "the statement

II. Appellant Cross was not forced to testify against his will

Judge Youngdahl, without objection, carefully questioned and advised appellants about their taking the stand (Tr. 359–367). Cross says that Judge Youngdahl required him to testify about both charges in the indictment when he only wanted to testify about one, and that the one he wanted to testify about was the one of which he was acquitted. The record shows, however, that Cross's complaint to the Judge was that he was being tried on both counts of the indictment at the same trial (Tr. 359–366). Cross: "I think it's an injustice to run both charges

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was true" can be interpreted as a reference to the prior affirmation. In any event, it was made perfectly plain by Kelton before and after the judge's remark, that he did not at trial endorse the truth of this prior statement that he first saw the watch on the day it was pawned. Even if they heard or interpreted the judge's remark as appellants read it, the jury could not have been misled as to Kelton's position on the matter. And the judge told the jury: "[I]f any statement is made which conflicts with your recollection of the same, you should rely solely and exclusively upon your own remembrance of the testimony in this case" (Tr. 578, 594).

Contrary to appellants' assertion (Br. 15–16) the prosecutor did not argue the truth of the prior inconsistent statement. He said: "[W]hen Jackson tells you * * * that he went in and pawned that watch at the request of Kelton, do you believe him? Do you believe that he had some purpose in signing Kelton's name? From his demeanor and actions on the stand, he's no fool; he's plenty wordly-wise, and was he signing Kelton's name figuring that if something ever should turn up about the watch they didn't have his signature; they had Kelton's. But we have Kelton in this particular case * * * who refused to take the rap or refused to take the responsibility of pawning the watch" (Tr. 558). Appellants complain that the prosecutor said that Kelton refused to "take the rap" and the responsibility for pawning the watch. But Kelton did precisely that at the trial. He said that he got the watch in a legitimate transaction from Kay Foster (Tr. 267). And he testified: "I got thinking about the watch. I put it home and leave it. So when I seen Jackson, we was downtown where *he was the one* that said, You know, let's pawn the watch. So I told him, I'm not going to pawn the watch behind what people are saying about the girl, it might be stolen or something. So I wasn't going to pawn the watch * * *. So Jackson got to talking and said wasn't nothing wrong with the watch. I told him if nothing was wrong with it he could pawn it." Question: "You later turned the watch over to Jackson to pawn?" Kelton: "Yes. *At his suggestion. He said, Let's pawn the watch*" (Tr. 272–273). [Emphasis supplied.]

The prosecutor's statement "We have the watch in the possession of the defendant" was, of course, based on the undisputed trial evidence, including Jackson's own admission, that Jackson pawned the watch.

together. The charges are independent of one another" (Tr. 365). (Cross also attempted to offer the court two unrelated motions at the time the court was questioning him on his wish to take the stand (Tr. 363–365)). Cross did not complain that trial on both counts forced him to testify as to both counts. Indeed, the record affirmatively shows that Cross desired to take the stand to defend against the first count, the church robbery, of which he was convicted. On the third day of trial, *before the government had presented any evidence on the second count,* Cross's counsel told Judge Youngdahl: "Your honor, my defendant says I'm beginning to believe you think I'm guilty. I said, Mr. Defendant, I didn't say that, but I said, they have very powerful evidence here. *He said I want to deny it.* I am perfectly willing for him to take the stand" (Tr. 219). Also there is no basis for the speculation (Br. 24) that Cross did not wish to take the stand to testify on the church robbery because he had a witness to testify that he was elsewhere on the night of that robbery. The witness, Susenberg, was very elusive (Tr. 421–423). He testified after Cross took the stand. At the time Cross took the stand Susenberg had failed to appear (Tr. 367–368).

ARGUMENT

III. Appellants are not entitled to a new trial by reason of their being charged in the indictment with two robberies, of one of which they were acquitted

Appellants contend that the two robbery charges were improperly joined in the same indictment, and that they are thereby entitled to a new trial, despite the fact that they were acquitted of one of the charges and the evidence against them on the other was overwhelming. As authority they cite dicta, and cases in which not all of the multiple defendants were accused of all the joined offenses. Rule 8(a), Fed. R. Cr. P., which nowhere states that it is applicable exclusively to single defendants, and Rule 8(b), taken together, do not preclude the indictment from joining similar offenses where all the defendants are charged with all the offenses.[16] Certainly the present

[16] Rule 8(a): *Joinder of Offenses:* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of

case, in which only two offenses and two defendants are charged, raises no specter of a "mass trial." Compare the cases where separate crimes linked by a conspiracy are validly charged against multiple defendants, all of whom are not involved in each separate crime, *e.g.*, *Monroe* v. *United States*, 98 U.S. App. D.C. 228, 234 F. 2d 49 (1956) (8 defendants, 18 specific crimes); *Matthews et al.* v. *United States*, Nos. 17,475, 17,557, 17,558, decided May 29, 1963 (7 defendants, 7 transactions, 21 counts—see indictment, J.A. 1–10).

In any event, appellants' acquittal on the joined charge, taken with the overwhelming evidence on the charge of which they were convicted, makes harmless Judge Youngdahl's refusal to sever the charges, even if it would have been appropriate for him to grant pre-trial severance. *Dunaway* v. *United States*, 92 U.S. App. D.C. 299, 205 F. 2d 23 (1953).

IV. The trial judge's instruction to the jury about accomplices, to which there was no objection, was unexceptionable

Judge Youngdahl gave an instruction to the jury about accomplice testimony that was advantageous to appellants (Tr. 594–596). When he said that Foster and Price "must be con-

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the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Rule 8(b): *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts of transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Appellants asked for separate trials of the two counts, but what is involved is the question of whether or not the defendants, not the counts, should have been separated. Where A and B are charged with crime one, and A alone is charged with unconnected crime two, quite obviously B is improperly joined with A in an indictment charging crimes one and two, since B has nothing to do with crime two. That is all that the cases cited by appellants hold. But where, as here, A and B are both charged with crimes one and two, B, charged with A with crime one, cannot complain that he is improperly joined with A as to crime two, since he is also charged with crime two. The only complaint can be the one that appellants made in this case, *i.e.*, that the same jury should not hear proof of both crimes. On that the judge has wide discretion, and even if he exercised it improperly here, which we submit he did not, the acquittal on one of the counts cures the error.

sidered as accomplices in the robbery" (Tr. 595), he clearly meant these words in a sense favorable to appellants. Appellants obviously so understood the words, for they did not object. Rule 30, Fed. R. Cr. P. Since it was so clear that Foster and Price were accomplices, appellants' interests were better served by an instruction that made it plain that the accomplice instruction applied to the girls than they would have been had the point been made less emphatically. The opportunity that appellants say the jury lost to find that Foster and Price had nothing to do with the crime was not a real one. As Jackson's counsel said: "So there is no question about the fact that [Foster and Price] were there" (Tr. 565).

V. It was not error for the judge to permit the jury to know that Father Carney died shortly after the robbery

The jury was properly informed that Father Carney was ill at the time of the robbery and died shortly after it (Tr. 55, 57, 63, 64). The government must prove the crime as well as the guilt of the defendants. Father Carney's illness and death was a circumstance indissolubly linked with the robbery. It had much to do with Father Cantwell's thoughts and actions during and just after the robbery (Tr. 55–57, 63–66). The jury should no more have been shielded from knowledge of this circumstance than it should have been shielded from knowledge that appellants chose a church and its priests for their victims. Beyond this, the death of the priest hard upon the robbery tended to prove the element of "putting in fear" charged in the indictment. And Father Carney's illness was relevant to Father Cantwell's explanation of why he didn't get a better look at one of the robbers: "The other one, any time I looked over toward Father Carney, I was more interested in Father Carney than I was in the individual" (Tr. 66). Father Carney's death, of which appellants, Foster and Price read the next day, had, as Foster told the jury, an effect on appellants and their motions and motivations the next day: "We went back [to Key Bridge] to get the box and things because they were showing and after we read where the priest died, we went back to get them to make sure that they were well hidden" (Tr. 97–98). It was then that Foster put the cash box in

the sewer from which it was subsequently recovered (Tr. 98, 102). In addition, of course, it was necessary for the jury to know why Father Carney did not testify. Finally, it is to be noted that the judge gave a cautionary instruction on the matter (Tr. 603).

ARGUMENT

VI. The trial judge dealt properly with Cross's outbursts

After Cross and his witness Susenberg had testified, and as Jackson's defense was nearing its conclusion, Cross indicated that he wished to resume the stand to give further testimony on the subject of the second count of the indictment, of which he was acquitted. He was given every opportunity by his counsel and the court to add relevant testimony (Tr. 514–518). At no time did he indicate he had more to say about the church robbery. Finally he stated: "I had about eleven dollars of mine own, and the police picked me up and arrested me and took my money, and I would like to ask to have my money returned to me. The police say it can be used as evidence against me." The court: "That is not before us, the question of the returning of the money." Mr. Laughlin [Cross's counsel]: "No. I have no further questions, Your Honor." Cross: "Yes, but I think it's something that the ladies and gentlemen of the jury should hear" (Tr. 518). After brief cross-examination Cross's counsel said he had nothing further. Cross: "Well, I would like the say something to the ladies and gentlemen of the jury" (Tr. 519). The court told him to discuss it with his counsel. After consultation, counsel announced that Cross rested. Cross burst out: "Why you don't want the people to hear? * * * He offered me a Government proposition, didn't he? The Government came back and offered me a proposition" (Tr. 519). Shortly thereafter, as a witness for Jackson began to testify, Cross again interrupted the proceedings: "Your Honor, I would like to have my lawyer give me my money back. I would like to have him give my money back * * * I don't want this man for my lawyer. I want my money back. He took my money and everything and propositions from the Government and everything" (Tr. 520–521).

Cross now complains that Judge Youngdahl violated his rights by silencing him when he said he wanted his money back and didn't want his lawyer.[17] In the circumstances presented here it was not incumbent on Judge Youngdahl to interrupt the trial to inquire into Cross's dissatisfactions. As far as Cross was concerned the trial was nearly over. He and his one witness had testified. Only two witnesses remained before the completion of Jackson's case.[18] It is plain from the record that Cross's outbursts were an expression of his anger at not being permitted to give irrelevant testimony and at the fact that the evidence was against him. In this connection, Cross's stress on his desire to have his money back, rather than to change lawyers, is significant. Cross was grasping at the straw of contumaciousness. Judge Youngdahl properly refused to tolerate his misbehavior. Furthermore, interruption of the trial to secure new counsel was not possible. To have Jackson's counsel assume the defense of Cross at that late hour would plainly have prejudiced Jackson. For such a defendant to have concluded the trial representing himself could not have benefited himself and could only have made a mockery of orderly trial procedure. The claim of ineffective assistance of

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[17] Not only in this case, but also in his other case now on appeal (No. 17,775), Cross is asserting his own contumaciousness with court and counsel as grounds for a new trial.

[18] Compare the cases cited by appellant: *Brown* v. *United States*, 105 U.S. App. D.C. 77, 264 F. 2d 333 (1959), *cert. denied*, 360 U.S. 911 (1959), where the defendant challenged counsel before trial began; and *United States* v. *Mitchell*, 137 F. 2d 1006, 138 F. 2d 831 (2d Cir. 1943). In the latter case, at 138 F. 2d 831, the court said:

"It now appears that a jury was impaneled late on Friday afternoon, March 13, 1942, and that the incident occurred just as trial was resumed at noon the following Monday. An objection so made at this early stage of a trial may well be more favorably viewed than one made later after the prosecution has disclosed its case; indeed, our [earlier] opinion [137 F. 2d 1006] states as much. Even so, when a jury case is already on trial in a district with a crowded calendar such as obtains in the Southern District of New York, a continuance for the obtaining and indoctrination of new counsel would be disruptive of the court's business and could not be claimed under the circumstances except for rather exceptional cause. Hence, so far as appears here, the most that defendant could reasonably have expected would have been the getting rid of his attorney after proper warning by the court of the consequences and the dubious privilege of proceeding unaided.

counsel is hardly persuasive in view of the overwhelming weight of the evidence against Cross on the church robbery charge and his acquittal on the other charge.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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U.S. GOVERNMENT PRINTING OFFICE: 1963

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 17,596

HAROLD S. CROSS

Appellant

v.

UNITED STATES

Appellee

No. 17,597

[illegible] JACKSON,

Appellant

v.

UNITED STATES

Appellee

APPEALS FROM JUDGMENTS OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF
FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

The brief for Appellants filed herein amply replies to the points raised in Appellees' brief.

However, Appellants should like to call the Court's attention to the fact that the Government does not convincingly challenge that the trial court erroneously admitted into evidence a prior inconsistent statement without instructing the jury that the statement could only be used in impeachment of the hostile witness and not as substantive evidence, that the trial court affirmatively compounded this error by remarks which led the jury to believe that impeachment evidence was the same as substantive evidence, and that the prosecution improperly used the prior inconsistent statement as affirmative evidence. The Government merely states that there was no prejudicial error.

An examination of this position shows that the Government erroneously presupposes that, in order to obtain reversal, the prejudicial impact of the prior inconsistent statement must be of the extraordinarily critical kind which occurred in the Bartley case. In Bartley the only evidence of a necessary element of the prosecution's case was supplied by the improperly admitted prior inconsistent statement. Rarely, if ever, will a case parallel Bartley in that respect. It is clearly erroneous, as we shall show, to convert an illustration of prejudice into an all inclusive definition of it. But in a very important sense the prejudice here was greater than in Bartley for in this case we have both

the trial court and the prosecution affirmatively treating the prior statement as substantive evidence. In Bartley the error was purely one of omission, i.e., the trial court (as was also the case here) failed to instruct the jury that the statement was not to be used as substantive evidence.

The Government's equation of prejudicial error necessitating reversal with the unique type of prejudice present in Bartley is not the law. The correct standard was set forth in Leigh v. United States, _____ U.S. App. D.C. _____, 308 F.2d 345, 346 (1962), where a document was improperly admitted into evidence:

> "The Government urges, further, that in any event, the error, if it was error, was harmless because of the other overwhelming evidence of defendant's guilt. Certain it is that evidence of his guilt, even without the card, was substantial and might very well have caused the jury to bring in a verdict of guilty, but we cannot say that the matter objected to did not have substantial influence on the jury in rendering its verdict. See Kotteakos v. United States (1946), 328 U. S. 750, at page 765, 66 S.Ct. 1239, at page 1248, 90 L.Ed. 1557, where the following appears:
>
> '(I)f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.'"(emphasis added)

It cannot be concluded, we submit, that the Kelton incident "did not have substantial influence on the jury in rendering its verdict". Imputing possession of the stolen watch to the defendants was a matter of first importance in the trial. Without this link the substantial testimony of numerous alibi witnesses might well have generated a reasonable jury doubt in the mutually inconsistent stories given by the heavily impeached accomplices, Foster and Price. As corroboration of the confessed accomplices, the Government points to evidence that defendants were with the accomplices at a "tourist home" five hours after the crime took place (Burton, Tr. 224; Chase, 298). But this does not corroborate commission of the crime, or at least the jury may have so reasoned. 1/ Kelton's prior inconsistent statement -- which should not have been admissible as substantive evidence -- was the only corroborative assertion tying the defendants to the crime itself, for it placed the watch in their possession. Its improper use by the jury, especially when led to do so by both court and prosecutor, might well have been decisive.

1/ See Campbell v. United States, _____ U. S. App. D. C. _____, 316 F.2d 681, 682-683 (1963) for the little weight to be given such testimony.

The Government states that this corroborative testimony came from "two disinterested witnesses". These two (Burton and Chase) were anything but disinterested witnesses. They were in fact the owners of the "tourist home" which Appellants, under the second count of the indictment, were charged with having robbed more than two months after the church robbery (Burton, Tr. 226-232, 234-246; Chase, Tr. 300-303). Since Appellants were acquitted of this robbery, the credibility of these "corroborative" witnesses is far from clear.

Moreover, the Government's position, at best, is refuted by Kotteakos. That position is that there was no prejudice because there was other evidence of guilt. But "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error". Kotteakos v. United States, supra, at 765. 2/

CONCLUSION

For the reasons stated in the Brief for Appellants and for the foregoing reasons, it is respectfully submitted that Appellants are entitled to a new trial.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Reply Brief for Appellants were served personally, this 29th day of October, 1963, upon the United States Attorney, United States Court House, Third and Constitution Avenues, Washington 1, D.C.

James R. Stoner
Counsel for Appellant Jackson
(Appointed by this Court)

2/ The record unequivocally demonstrates that Kelton at all times refuted the extrajudicial statement of Jackson's ownership of the watch (Tr. 256-292).